No. 89-680

In The

Supreme Court of the United States

October Term, 1989

JAMES B. BEAM DISTILLING CO.,

Petitioner,

v.

STATE OF GEORGIA, JOE FRANK HARRIS, individually and as Governor of the State of Georgia, MARCUS E. COLLINS, individually and as Georgia State Revenue Commissioner, and CLAUDE I. VICKERS, individually and as Director of the Fiscal Division of the Department of Administrative Services,

Respondents.

On Writ Of Certiorari To The Supreme Court Of Georgia

JOINT APPENDIX

Counsel of Record for Petitioner:
JAMES B. BEAM DISTILLING CO.
MORTON SIEGEL
SIEGEL, MOSES & SCHOENSTADT
10 East Huron Street
Chicago, Illinois 60611
(312) 664-8998

JOHN L. TAYLOR, JR.
VINCENT, CHOREY, TAYLOR & FEIL
A Professional Corporation
Suite 1700, The Lenox Building
3399 Peachtree Road, N.E.
Atlanta, Georgia 30326
(404) 841-3200

Additional Counsel:
CELESTE McCOLLOUGH
MICHAEL A. COLE
VINCENT, CHOREY, TAYLOR & FEIL
A Professional Corporation
Suite 1700, The Lenox Building
3399 Peachtree Road, N.E.
Atlanta, Georgia 30326
(404) 841-3200

Counsel of Record for Respondents:
AMELIA WALLER BAKER
Staff Attorney

MICHAEL J. BOWERS
Attorney General

H. PERRY MICHAEL
Executive Asst. Attorney General

HARRISON KOHLER
Deputy Attorney General

DANIEL M. FORMBY
Senior Asst. Attorney General

WARREN R. CALVERT
Assistant Attorney General

Georgia Department of Law
132 State Judicial Building
Atlanta, Georgia 30334
(404) 656-3388

Petition for Certiorari filed October 16, 1989
Certiorari granted June 11, 1990

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CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

April 24, 1987 – Complaint filed in the Superior Court of Fulton County, State of Georgia.

May 26, 1987 – Answer filed in the Superior Court of Fulton County, State of Georgia.

May 27, 1988 – Final Order issued by the Superior Court of Fulton County, State of Georgia, per Judge Ralph Hicks.

June 16, 1988 – Notice of Appeal filed by Plaintiff with the Superior Court of Fulton County, State of Georgia.

July 14, 1988 – Amended Notice of Appeal filed with the Superior Court of Fulton County, State of Georgia.

July 14, 1989 – Decision issued by the Supreme Court of Georgia affirming the Trial Court's ruling on the issue of prospective v. retroactive application.

July 24, 1989 – Motion for Reconsideration filed in the Supreme Court of Georgia.

July 26, 1989 – Order Denying Appellant James B. Beam Distilling Co.'s Motion for Reconsideration.

October 16, 1989 – Petition for Writ of Certiorari filed.

June 11, 1990 – Petition for Writ of Certiorari granted.

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

JAMES B. BEAM DISTILLING CO., a Delaware corporation, Plaintiff,	)	
v.	)	CIVIL ACTION FILE NO. D-42527 B16-264
STATE OF GEORGIA, JOE FRANK HARRIS, individually and as Governor of the State of Georgia, MARCUS E. COLLINS, individually and as Georgia State Revenue Commissioner, and CLAUDE L. VICKERS, individually and as Director of the Fiscal Division of the Department of Administrative Services,	)	
Defendants.	)	

COMPLAINT FOR REFUND OF TAXES
ILLEGALLY ASSESSED AND COLLECTED

The Plaintiff, by its attorneys, for its Complaint for refund of taxes illegally assessed and collected, alleges as follows:

PARTIES

1.

The Plaintiff, James B. Beam Distilling Co. (hereinafter "James Beam"), a Delaware corporation, is a producer and importer of alcoholic beverages and is engaged in business in interstate commerce throughout the United States. James Beam is permitted by federal and State authorities to import alcoholic beverages. James Beam

ships and sells alcoholic beverages produced outside the State of Georgia to licensed wholesalers doing business in the State of Georgia.

2.

Defendants are the State of Georgia and the State officials responsible for implementing, collecting, and administering the taxes that this refund action concerns.

3.

Defendant Joe Frank Harris is the Governor of Georgia and is responsible for enforcing its law. He is the State official who has authority, under Official Code of Ga. Ann. § 48-2-35(a), to authorize a refund of taxes.

4.

Defendant Marcus E. Collins is the Georgia State Revenue Commissioner (the "Commissioner") and is the State official who is charged with the duty to administer and enforce the State's revenue laws, including the taxes imposed under Official Code of Ga. Ann. § 3-4-60, which this refund action concerns.

5.

Defendant Claude L. Vickers is Director of the Fiscal Division of the Department of Administrative Services of the State of Georgia. The Commissioner is directed to

remit to the Fiscal Division the taxes (and penalties, interest, and fees) collected under Official Code of Ga. Ann. § 3-4-60.

6.

Because this action alleges Official Code of Ga. Ann. § 3-4-60 to be unconstitutional, the Attorney General of the State shall be served with a copy of this proceeding.

JURISDICTION AND VENUE

7.

The jurisdiction of this Court is predicated upon, and venue in this Court is proper pursuant to, Official Code of Ga. Ann. § 48-2-35(4)(A).

FACTUAL AND LEGAL BACKGROUND

8.

As a condition to selling alcoholic beverages to Georgia wholesalers, James Beam, during the time period relevant to this action, was required under Official Code of Ga. Ann. §§ 3-4-60 and 3-4-61 to pay the applicable State excise taxes by purchasing stamps in proper denominations denoting the payment of taxes and affixing such stamps to each bottle or container of alcoholic beverages.

9.

Official Code of Ga. Ann. § 3-4-60, as codified during the time period relevant to this action, on its face and as

applied constitutes an unlawful burden on interstate commerce in violation of the Commerce Clause, article I, section 8, clause 3 of the United States Constitution, because the State by its tax scheme favors domestic enterprises over businesses from other states.

10.

Official Code of Ga. Ann. § 3-4-60 discriminates against interstate commerce in violation of the Commerce Clause and the principle of *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984), because it has both the purpose and effect of discriminating in favor of local products by providing a direct commercial advantage to local enterprises, and is not supported by any clear concern of the Twenty-first Amendment to the United States Constitution.

11.

Official Code of Ga. Ann. § 3-4-60, as codified during the time period relevant to this action, imposes on alcoholic beverages not manufactured within Georgia a substantially greater tax than on domestic products. On its face, and as applied to James Beam, the statute discriminates in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

12.

The arbitrary distinction in Official Code of Ga. Ann. § 3-4-60 between domestic and foreign products and

enterprises is not rationally related to any legitimate State purpose. The statute is completely discriminatory, favoring domestic enterprises by taxing foreign enterprises at substantially higher rates solely because of their residence, thus the statute violates the Equal Protection Clause and the principle of *Metropolitan Life Insurance Co. v. Ward*, 470 U.S. 869 (1985).

CLAIM FOR REFUND

13.

In 1982, James Beam paid taxes under Official Code of Ga. Ann. § 3-4-60 in the amount $649,000.00.

14.

In 1983, James Beam paid taxes under Official Code of Ga. Ann. § 3-4-60 in the amount $857,000.00.

15.

In 1984, James Beam paid taxes under Official Code of Ga. Ann. § 3-4-60 in the amount $894,000.00.

16.

Thus, from 1982 to 1984, James Beam paid taxes under Official Code of Ga. Ann. § 3-4-60 in the total amount $2,400,000.00, all of which were illegally assessed and collected from James Beam.

17.

Pursuant to Official Code of Ga. Ann. § 48-2-35(a), a taxpayer shall be refunded any and all taxes which are determined to have been illegally assessed and collected from the taxpayer under the laws of this State, whether paid voluntarily or involuntarily, and shall be refunded interest on the amount of the taxes at the rate of 9% per annum from the date of payment of the tax to the Commissioner.

18.

Pursuant to Official Code of Ga. Ann. § 48-2-35(b)(1), James Beam timely made a claim for refund of the taxes illegally assessed and collected from James Beam during 1982 through 1984 under Official Code of Ga. Ann. § 3-4-60. An accurate facsimile of James Beam's claim filed in writing on or about April 25, 1985, in the form and containing such information as required, is attached hereto as Exhibit "A."

19.

In its claim for refund, James Beam requested a conference or hearing before the Commissioner in connection with the claim, however the Commissioner failed to grant a conference as required.

20.

James Beam's claim for refund has not been decided by the Commissioner or his delegate within one year from the date of filing the claim, thus Official Code of Ga.

Ann. § 48-2-35(4) gives James Beam the right to bring this action for refund.

21.

Pursuant to Official Code of Ga. Ann. § 48-2-35(5), this action is timely commenced.

PRAYER FOR RELIEF

WHEREFORE, James Bean prays:

(1) that this Court grant a refund of $2,400,000.00 for the taxes illegally assessed and collected from James Beam during 1982 through 1984 under Official Code of Ga. Ann. § 3-4-60, with interest;

(2) that the Court direct Defendants to take any and all action necessary to draw a refund from the State Treasury to James Beam in the amount prayed;

(3) that the Court award James Beam its attorneys' fees and the costs of this action; and

(4) that the Court grant James Beam such other and further relief as the Court may deem just and proper.

Respectfully submitted,

/s/ John L. Taylor, Jr.
Attorney For Plaintiff
James B. Beam Distilling Co.

Morton Siegel
Michael A. Moses
Richard G. Schoenstadt
James L. Webster

SIEGEL, MOSES & SCHOENSTADT
10 East Huron Street
Chicago, Illinois 60611

John L. Taylor, Jr.
John J. Schaub

CHOREY, TAYLOR & FEIL
A Professional Corporation
500 Candler Building
127 Peachtree Street, N.E.
Atlanta, Georgia 30303

Attorneys for Plaintiff
James B. Beam Distilling Co.

EXHIBIT A

LAW OFFICES OF
SIEGEL, DENBERG, VANASCO, SHUKOVSKY, MOSES & SCHOENSTADT

Avondale Centre * Suite 1700 * Twenty North Clark Street * Chicago, Illinois 60602

(312) 541-5505 Telecopier (312) 372-4744

Kenneth H. Denberg
Michael A. Moses
Richard G. Schoenstadt
David J. Shukovsky
Morton Siegel
Robert A. Vanasco

James L. Webster

April 25, 1985

Mr. Ed Vaughn, Director
Alcohol and Tobacco Tax Unit
Georgia Department of Revenue
270 Washington Street, S.W.
Atlanta, GA 30334

re: James B. Beam Distilling Co./Application for Credit for Beverage Alcohol Taxes

Dear Director Vaughn:

Enclosed please find James B. Beam Distilling Co.'s application for claim for refund pursuant to § 48-2-35 (Ga. Code Ann.) for distilled spirits excise taxes erroneously and illegally assessed and collected from Beam under § 3-4-60(1) (Ga. Code Ann.). Said claim is made for the years 1982, 1983 and 1984.

The authority upon which Beam relies is set forth under Subpar. 4, entitled "Basis of Claim". I would appreciate your contacting the undersigned for purposes of setting

up a conference relative to disposition of this claim. I will be out-of-town the week of April 29 and will be back in the office on Monday, May 6.

Thank you for your attention to this matter.

Very truly yours,

Morton Siegel

(Attachment to Siegal Letter)

GEORGIA DEPARTMENT OF REVENUE
ALCOHOL AND TOBACCO TAX UNIT
319 TRINITY-WASHINGTON BUILDING
ATLANTA, GEORGIA 30334

Telephone Number (404) 636-4263

APPLICATION FOR CREDIT FOR
BEVERAGE ALCOHOL TAXES

PART 1 – To be filled in by claimant.
JAMES B. BEAM DISTILLING CO.

1. NAME AND ADDRESS OF CLAIMANT
500 North Michigan Avenue

ADDRESS	CITY	STATE	ZIP CODE
	Chicago,	Illinois	60601

2. KIND OF TAX CREDIT CLAIMED

DISTILLED SPIRITS [X] MALT BEVERAGE [ ]
WINE [ ]

3. AMOUNT OF TAX CREDIT CLAIMED

$649,000.00 - 1982 $ 894,000.00 - 1984
$857,000.00 - 1983 $2,400,000.00 - TOTAL

4. BASIS OF CLAIM (Give the detailed information for which the claim is filed and other facts which will [Illegible] Revenue Commissioner the [illegible] for the claim. Please identify any documents or statements submitted in support of this claim.)

James B. Beam Distilling Co.'s claim for refund is pursuant to § 48-2-35 (Ga. Code Ann. for the reason that § 3-4-60 (Ga. Code Ann.) has imposed an excise tax on

distilled spirits which is unconstitutional, because it violates the Commerce Clause, Art. I. Sec. 8 Cl. 3 and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

The Georgia Department of Revenue, Alcohol, Tobacco and Tax Unit has erroneously and illegally assessed and collected from James B. Beam Distilling Co. under the laws of the State of Georgia the aforementioned excise tax on distilled spirits, commencing with the inception of the imposition of the tax. Notwithstanding said imposition of the tax, this claim is for the years 1982, 1983 and 1984.

The basis for Beam's claim is the principle enunciated by the United States Supreme Court in *Bacchus Imports, Ltd. v. Herbert H. Dias, Director of taxation of the State of Hawaii*, 104 S. Ct. 3049 (1984), and *Metropolitan Life Insurance Company, et al. Appellants v. W. G. Ward, Jr., et al.*, 53 Lw 4399 (3/26/85). Copies of both decisions are attached hereto.

Georgia's excise tax on distilled spirits imposed a higher tax rate on distilled spirits *imported* into the state than on distilled spirits *manufactured* in the State of Georgia. This erroneous classification represented preferential tax treatment for distilled spirits product manufactured in the State of Georgia. In *Bacchus*, the Supreme Court concluded that a similar taxing structure in Hawaii had both the purpose and effect of discriminating in favor of local products (Commerce Clause), and more recently, the Supreme Court in *Metropolitan Life* held that Alabama's preferential tax statute violated the Equal Protection Clause.

* * *

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

JAMES B. BEAM DISTILLING CO., a Delaware Corporation,

Plaintiff,

v.

STATE OF GEORGIA, JOE FRANK HARRIS, individually and as Governor of the State of Georgia, MARCUS E. COLLINS, individually and as Georgia State Revenue Commissioner, and CLAUDE L. VICKERS, individually and as Director of the Fiscal Division of the Department of Administrative Services,

Defendants.

CIVIL ACTION FILE NO. D-42527

(Filed May 26 1987)

ANSWER

COME NOW the above-named defendants and answer and defend against the complaint in the above-styled case as follows:

FIRST DEFENSE

The present action is barred by the doctrine of sovereign immunity and official immunity.

SECOND DEFENSE

Defendants Harris, Collins, and Vickers have at all times acted in good faith and within the scope of their authority.

THIRD DEFENSE

The court lacks subject matter jurisdiction over the present action.

FOURTH DEFENSE

The complaint fails to state a claim upon which relief can be granted.

FIFTH DEFENSE

Defendants respond to the individual paragraphs of the complaint as follows:

1.

Admit the allegations contained in paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 19, and 20 of the complaint.

2.

Deny the allegations contained in paragraphs 9, 10, 11, 12, and 16 of the complaint.

3.

State that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 13, 14, and 15 of the complaint.

4.

State that paragraphs 17 and 21 state legal conclusions and require no response of these defendants.

5.

Admit that plaintiff filed a claim for refund and that a facsimile of said claim is attached to the complaint as Exhibit A, but deny all other allegations contained in paragraph 18 of the complaint.

6.

Deny each and every allegation of the complaint not hereinbefore specifically admitted, qualified, or denied.

7.

Deny that the plaintiffs are entitled to any of the requested relief.

WHEREFORE, having fully answered, defendants pray:

(a) that the present action be dismissed or that judgment be entered in favor of defendants;

(b) that costs be cast upon the plaintiffs; and

(c) for such other and further relief as the court deems necessary and appropriate.

Respectfully submitted,

MICHAEL J. BOWERS 071650
Attorney General

H. PERRY MICHAEL 504000
First Assistant Attorney General

/s/ Verley J. Spivey
VERLEY J. SPIVEY 672700
Senior Assistant Attorney General

/s/ Jeff L. Milsteen
JEFF L. MILSTEEN 509820
Assistant Attorney General

PLEASE ADDRESS ALL COMMUNICATIONS TO:

JEFF L. MILSTEEN
Assistant Attorney General
132 State Judicial Building
Atlanta, Georgia 30334
Telephone: (404) 656-2278
(Our File No. 63AA-LA-52193-87)

CERTIFICATE OF SERVICE

I do hereby certify that I have this date served a copy of the foregoing ANSWER upon:

John L. Taylor, Jr.
Chorey, Taylor & Feil
500 Candler Building
127 Peachtree Street, N.E.
Atlanta, Georgia 30303

by placing the same into the United States mail with adequate first class postage placed thereon.

This 26th day of May, 1987.

/s/ Jeff L. Milsteen
JEFF L. MILSTEEN
Assistant Attorney General

O.C.G.A. § 3-4-60 (1982):

ARTICLE 4

EXCISE TAXATION

PART 1

STATE

3-4-60. Levy and amount of tax.

The following state excise taxes are levied and imposed:

(1) On the importation of all distilled spirits imported into this state, a tax of $1.00 per liter and on all alcohol imported into this state, a tax of $1.40 per liter, and a proportionate tax at the same rate on all fractional parts of a liter;

(2) On the manufacture of all distilled spirits manufactured in this state from Georgia-grown products, a tax of 50¢ per liter and on all alcohol manufactured in this state from Georgia-grown products, a tax of 70¢ per liter, and a proportionate tax at the same rate on all fractional parts of a liter. (Ga. L. 1937-38, Ex. Sess., p. 103, §§ 11, 12; Ga. L. 1964, p. 62, § 3; Ga. L. 1972, p. 207, § 6; Ga. L. 1974, p. 615, § 1; Ga. L. 1976, p. 692, § 1; Ga. L. 1977, p. 1154, § 2; Ga. L. 1978, p. 1645, § 1; Code 1933, § 5A-2701, enacted by Ga. L. 1980, p. 1573, § 1; Ga. L. 1981, p. 1269, § 35.)

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

JAMES B. BEAM DISTILLING CO., a Delaware Corporation, Plaintiff, v. STATE OF GEORGIA, JOE FRANK HARRIS, individually and as Governor of the State of Georgia, MARCUS E. COLLINS, individually and as Georgia State Revenue Commissioner, and CLAUDE L. VICKERS, individually and as Director of the Fiscal Division of the Department of Administrative Services, Defendants.	CIVIL ACTION FILE NO. D-42527 (Filed May 27, 1988)

FINAL ORDER

This action came on for hearing on Cross Motions for Summary Judgment filed by plaintiff and defendants. The questions presented for resolution by the Court are whether O.C.G.A. §3-4-60, as that statute existed and was applied in 1982, 1983 and 1984 (prior to its amendment in 1985) violated the Commerce Clause and the Equal Protection Clause of the United States Constitution by discriminating against out-of-state producers of alcoholic beverages in order to promote the manufacture of alcoholic beverages and the local production of the component materials of alcoholic beverages within Georgia.

UNDISPUTED FACTS

The Court observes that there is no genuine dispute with respect to the following material facts:

1.

James B. Beam Distilling Co. (hereinafter "James Beam") is a Delaware corporation.

2.

James Beam is a producer and importer of alcoholic beverages.

3.

James Beam is engaged in business in interstate commerce throughout the United States.

4.

James Beam is permitted by federal and Georgia authorities to import alcoholic beverages.

5.

James Beam ships and sells alcoholic beverages produced outside the State of Georgia to licensed wholesalers doing business in the State of Georgia.

6.

Defendant Joe Frank Harris is the Governor of Georgia.

7.

Joe Frank Harris is the State official who has authority, under O.C.G.A. §48-2-35(a), to authorize a refund of taxes.

8.

Defendant Marcus E. Collins is the Georgia State Revenue Commissioner (hereinafter "Commissioner") and is the State official who is charged with the duty to administer and enforce the State's revenue laws, including the taxes imposed under O.C.G.A. §3-4-60.

9.

Defendant Claude L. Vickers is the Director of the Fiscal Division of the Department of Administrative Services of the State of Georgia (hereinafter "Fiscal Division").

10.

The Commissioner is directed to remit to the Fiscal Division the taxes (and penalties, interest, and fees) collected under O.C.G.A. §3-4-60.

11.

The jurisdiction of this Court is predicated upon, and venue in this Court is proper pursuant to, O.C.G.A. §48-2-35(4)(A).

12.

As a condition to selling alcoholic beverages to Georgia wholesalers, James Beam, during the time period relevant to this action, was required under O.C.G.A. §§3-4-60 and 3-4-61 to pay the applicable state excise taxes by purchasing stamps in proper denominations denoting the payment of taxes and affixing such stamps to each bottle or container of alcoholic beverages.

13.

Pursuant to O.C.G.A. §48-2-35(a), a taxpayer shall be refunded any and all taxes which are determined to have been illegally assessed and collected from the taxpayer under the laws of the State of Georgia, whether paid voluntarily or involuntarily, and shall be refunded interest on the amount of the taxes at the rate of 9% per annum from the date of payment of the tax to the Commissioner.

14.

On or about April 25, 1985, James Beam made a claim for refund of taxes assessed and collected from James Beam during 1982 through 1984 under O.C.G.A. §3-4-60 (hereinafter "Refund Claim").

15.

The Refund Claim is in the form and contains such information as required pursuant to O.C.G.A. §48-2-35(b)(1).

16.

In the Refund Claim, James Beam requested a conference or hearing before the Commissioner in connection with the claim, but the Commissioner failed to grant a conference.

17.

The Refund Claim was not decided by the Commissioner or his delegate within one year from the date of filing the Refund Claim.

18.

Because the Refund Claim was not decided by the Commissioner or his delegate within one year from the date of filing, O.C.G.A. §48-2-35(4) gave James Beam the right to bring an action for refund in this Court.

19.

Pursuant to O.C.G.A. §48-2-35(5), this action is timely commenced.

20.

Under O.C.G.A. §3-4-60, as codified during the time period relevant to this action, locally produced distilled spirits are taxed at 50 cents per liter.

21.

Under O.C.G.A. §3-4-60, as codified during the time period relevant to this action, locally produced alcohol is taxed at 70 cents per liter.

22.

Under O.C.G.A. §3-4-60, as codified during the time period relevant to this action, distilled spirits manufactured outside Georgia are taxed at $1.00 per liter.

23.

Under O.C.G.A. §3-4-60, as codified during the time period relevant to this action, alcohol manufactured outside Georgia is taxed at $1.40 per liter.

24.

All alcoholic beverages covered by O.C.G.A. §3-4-60, as codified during the time period relevant to this action, are taxed proportionately at the applicable rate on all fractional parts of a liter.

25.

No legislative history or other evidence is contained in the record to support the State's contention that

O.C.G.A. §3-4-60 was originally enacted with a disparity to cover the added cost of regulating this imported product.

26.

O.C.G.A. §3-4-60 was enacted to encourage Georgia residents to grow products used to produce alcohol and distilled spirits.

CONCLUSIONS OF LAW

1.

O.C.G.A. §3-4-60 was enacted exclusively for the benefit of Georgia grown products and Georgia manufacturers of alcohol.

2.

The disparity in taxation in O.C.G.A. §3-4-60 was unrelated to the costs of regulation and enforcement.

3.

Bacchus Imports, Ltd. v. Dias, 468 U.S. 263, 270 (1984) provides that if either the purpose or effect of a state tax is to discriminate in favor of local businesses or goods, then the legislation may constitute "simple economic protectionism" and, if so, is virtually *per se* invalid. This Court holds that, as a matter of law, the effect of O.C.G.A. §3-4-60 is discriminatory against alcoholic beverages produced outside the state of Georgia in that said beverages are taxed at twice the rate of beverages produced in

Georgia from Georgia-grown products. The Twenty First Amendment to the United States Constitution permits the State to discriminate under certain now more clearly defined circumstances where interstate commerce of alcohol is involved.

4.

"[O]nce a state law is shown to discriminate against interstate commerce 'either on its face or in practical effect' the burden falls on the State to demonstrate both that the statute 'serves a legitimate local purpose,' and that this purpose could not be served as well by available non-discriminatory means." *Main v. Taylor*, ___ U.S. ___, 106 S. Ct. 2440, 2448 (1986). This Court holds that, in view of the facially discriminatory effect of the statute as it existed during the years in question, the burden to show a legitimate local purpose has fallen to the State. The defendants in this action have not met their burden to show a correlation between the higher tax on out-of-state alcoholic beverages and the contended additional costs involved in regulating such beverages, which the defendants claim to be the justification for the disparity.

5.

This Court further holds that the purpose of O.C.G.A. §3-4-60, as it existed during the years in question, was economic protectionism, i.e., to benefit local business and local industry. This purpose is indicated by the legislative history, 1937-38 Ga. Laws Ex. Sess. 115, 117 (alcohol and distilled spirits). *See also* 1937 Ga. Laws 851, 853-54 & 1935 Ga. Laws 492 (the original purpose of the

discrimination against "foreign wines" was "to foster and encourage the growing of grapes, fruits and berries on Georgia farms" and "to exempt from all taxation wines made . . . by producers in Georgia of such crops". The protectionist purpose of the statute is further indicated by the exhibits "A-3" through "A-13" produced by the plaintiff in opposition to the defendants' Motion for Summary Judgment and produced to plaintiff by the defendants pursuant to this Court's Order of December 3, 1987).

"Examination of the State's purpose in this case is sufficient to demonstrate the State's lack of entitlement to a more flexible approach permitting an inquiry into the balance between local benefits and the burden on interstate commerce. *See Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)." *Bacchus*, 468 U.S. at 270.

6.

The decision of the Georgia Supreme Court in *Heublein, Inc. v. Georgia*, 256 Ga. 578, 351 S.E.2d 190 (1987) is not dispositive of this case for the reason that the application of the Twenty First Amendment to the United States Constitution to the statute there under attack saved the State in light of record substantiating the necessity for a higher tax on distilled spirits produced outside Georgia. Such is not the case here. That case involved O.C.G.A. §3-4-60 as amended in 1985 to alter the preferential taxing scheme by applying an add-on tax on the importation of alcoholic beverages manufactured outside the State of Georgia and the amount of the add-on tax was justified by the present additional expense necessary to regulate

this industry. Here, the record before this Court concerning a statute in effect for 30 years, is silent as to any such need existing at the time of its enactment. Viewing the statute attacked here in light of *Bacchus* one clearly discerns that the original purpose of the 1938 Act was economic protectionism and the Commerce Clause has been violated notwithstanding the authority granted the States under the Twenty First Amendment. The State has shown, via *Heublein*, that there is a reasonable difference in the costs of administering control over imported and domestic alcoholic beverages. However, the State may not bootstrap its argument contending that this evidence somehow supplies a non violative purpose for the 1938 Act.

7.

The contention that the statute in question violates the Equal Protection Clause of the Constitution is meritless. Like *Heublein* this case involves " 'purely economic matters that traditionally merit only the mildest review under the Fourteenth Amendment.' " *Heublein Inc. v. State of Georgia*, 256 Ga. 578, 585 (1987) (quoting *Craig v. Boren*, 429 U.S. 190, 207 (1976)). The stated purpose of the 1938 Act for "legalizing and controlling" the importation of alcoholic beverages supports a finding that the import tax is rationally related to a legitimate state objective of regulating the importation of alcohol pursuant to the Twenty First Amendment when tested by the requirements solely of equal protection. The disparity in taxes is inconsequential in an equal protection context.

8.

This Court holds that the statute in question, as it existed during the years of 1982, 1983 and 1984 was an unconstitutional infringement upon interstate commerce in violation of the Commerce Clause of the United States Constitution. However, this decision is to be applied prospectively, resulting in no refund to the plaintiff of the taxes paid pursuant to that statute for the above years. Georgia has adopted the test of *Chevron Oil Co. v. Huston*, 404 U.S. 97, 106-107 (1971) in determining whether a ruling should apply retroactively. *Federated Mutual Insurance Co. v. DeKalb County*, 176 Ga. App. 70, 72 (1985). These factors require that the Court (1) "must establish a new principle of law, either by overruling clear past precident [sic] on which litigants may have relied . . . or by deciding an issue of first impression whose resolution was not clearly foreshadowed . . . " *Chevron*, 404 U.S. at 106 (citations omitted); (2) " 'weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation.' " *Id.* at 106-07 (quoting *Linkletter v. Walker*, 381 U.S. 618 (1965)); (3) weighing the inequity imposed by application to determine whether the decision could "produce substantial inequitable results". *Id.* at 107 (citations omitted).

9.

First, in the present action, the decision of this Court establishes a new principle of law by overruling a past

statute on which defendants relied. *See Strickland v. Newton County*, 244 Ga. 54, 55 (1979); *Ashland Oil Inc. v. Rose*, 350 S.E.2d 531, 535 (W. Va. 1986). Second, it is unnecessary to address the retrospective operation of the decision of this Court by applying a "weighing of the merits" test since the offending statute was amended in 1985 to remove its Constitutional infirmaties and no effort will be made hereafter to assert its validity by defendants. Lastly, the Court declines to apply this decision retroactively since it finds that here, as in a prior Georgia Supreme Court decision, "unjust results would accrue to those who justifiably relied on it."] *Strickland v. Newton County*, 244 Ga. 54, 55 (1979); *Preston Carroll Co. v. Morrison Co.*, 173 Ga. App. 412, 414, *rev'd on other grounds*, 254 Ga. 608 (1985).

ORDER

Based on the foregoing Findings and Conclusions, it is hereby ORDERED and ADJUDGED as follows:

1.

The Court having considered the entire record including all exhibits submitted hereby GRANTS the Motion for Summary Judgment filed by plaintiff James B. Beam Distilling Company to the extent that it seeks to declare unconstitutional O.C.G.A. §3-4-60 and the Motion for Summary Judgment filed by defendants is accordingly DENIED.

2.

The Court having found that the test required by *Chevron Oil Co. v. Huston* has been met, hereby DIRECTS that this decision as it affects the imposition of taxes shall be applied prospectively. The Court hereby DIRECTS that the date of prospective application of this decision shall be the date of the enactment of the amendment to O.C.G.A. §3-4-60 and shall apply only to tax liability of plaintiff, if any, as of the date the statute was enacted in its present form. Having concluded that this decision should not be applied retroactively so as to allow plaintiff to recover a refund under O.C.G.A. §42-2-35(b)(1), and that this decision shall apply prospectively, plaintiff shall recover nothing. Further, the Court finds there is no just reason for delay and DIRECTS that Judgment be entered.

So ORDERED this 27th day of May, 1988.

/s/ Ralph H. Hicks
RALPH H. HICKS, JUDGE
Fulton Superior Court
Atlanta Judicial Circuit

CASE NUMBER 46642

IN THE SUPREME COURT
FOR THE STATE OF GEORGIA

JAMES B. BEAM DISTILLING CO.,
Appellant,

v.

STATE OF GEORGIA, JOE FRANK HARRIS, individually and as Governor of the State of Georgia, MARCUS E. COLLINS, individually and as Georgia State Revenue Commissioner, and CLAUDE L. VICKERS, individually and as Director of the Fiscal Division of the Department of Administrative Services,

Appellees.

BRIEF OF APPELLANT

COUNSEL OF RECORD: MORTON SIEGEL
SIEGEL, MOSES & SCHOENSTADT
10 EAST HURON
CHICAGO, ILLINOIS 60611
TELEPHONE: 312/664-8998

ADDITIONAL COUNSEL: JOHN L. TAYLOR, JR.
MICHAEL A. COLE
VINCENT, CHOREY, TAYLOR & FEIL
A PROFESSIONAL CORPORATION
THE LENOX BUILDING, SUITE 1700
3399 PEACHTREE ROAD, N.E.
ATLANTA, GEORGIA 30326
TELEPHONE: 404/841-3200

IN THE SUPREME COURT
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JAMES B. BEAM DISTILLING CO.,
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Appellees.

CASE NO. 46642

BRIEF OF APPELLANT

I. Statement of Jurisdiction

Plaintiff/Appellant's complaint sought a refund of taxes paid pursuant to a Georgia statute that, during the years in question, improperly and unconstitutionally discriminated against out-of-state liquor manufacturers, of which Appellant is one. Therefore, since this appeal involves the constitutionality of a Georgia statute, jurisdiction is conferred upon this Court by Article 6, Section 6, paragraph 2 of the Constitution of the State of Georgia.

II. Judgment Appealed and Date of Entry

On May 27, 1988 an Order was entered by the Superior Court of Fulton County, State of Georgia, declaring unconstitutional O.C.G.A. § 3-4-60, as codified during the years in question – 1982, 1983 and 1984. (The statute, although superficially amended in 1985, grants preferential taxing treatment to alcoholic beverages manufactured from Georgia grown products in contravention of *Bacchus Imports. Ltd. v. Dias*, 468 U.S. 263 (1984).) A complete copy of the court's Order is herewith attached as Exhibit "A". At paragraph 9 of the Order the court declined to apply this decision retroactively so as to provide Appellant with a refund of the taxes that it paid during the years in question.

Appellant filed its Notice of Appeal with the superior Court on June 16, 1988 and on June 27, 1988 Appellees filed their Notice of Cross-Appeal. Both appeals were made to the Georgia Court of Appeals. On July 14, 1988 the parties by consent filed an Amended Notice of Appeal to place both the underlying appeal and cross-appeal before this Court, where they properly rest. However, because of a technicality in the way in which the Amended Notice of Appeal by consent was styled, the issue of whether the statute in question is unconstitutional originally was left before the Georgia Court of Appeals but has since been transferred to this Court in a separate appeal. Therefore, the sole issue before this Court in *this* appeal is the superior Court's ruling applying its decision prospectively only.

III. Legal Issues

Whether the trial court was correct as a matter of law in ruling its decision holding O.C.G.A. § 3-4-60 unconstitutional to be prospective only.

IV. Statement of Facts

This appeal arises out of Appellant James B. Beam Distilling Company's (hereinafter "James Beam") action in the trial court for the refund of taxes illegally assessed and collected from James Beam. S.R.-12 *et seq.* (O.C.G.A. § 48-235 (a) requires that the taxpayer be refunded all taxes "determined to have been erroneously or illegally assessed and collected. . . . ") James Beam ships and sells alcoholic beverages produced outside the State of Georgia to licensed wholesalers doing business in the State. S.R.-113 at paragraph 5. Defendants are the State of Georgia and its taxing authorities. *Id.* at paragraphs 6-10.

As a condition to selling alcoholic beverages to Georgia wholesalers, James Beam, during the time period relevant to the underlying action, was required under O.C.G.A. §§ 3-4-60 and 3-4-61 to pay the applicable state excise taxes on sales of its alcoholic beverage products. *Id.* at paragraph 12. O.C.G.A. § 3-4-60, prior to 1985, taxed locally produced "distilled spirits" at $.50 per litre and locally produced alcohol at $.70 per litre, while taxing their counterparts manufactured outside Georgia at $1.00 and $1.40, respectively. *Id.* at paragraphs 25 through 28. In 1982, James Beam paid taxes in the amount of $649,000.00; in 1983, in the amount of $857,000.00; and in 1984 in the amount of $894,000.00. *Id.* at paragraphs 13-15. Therefore the total amount of taxes improperly

levied against James Beam during the years in question amounted to $2,400,000.00.

In the trial court James Beam sought and was granted summary judgment on its contention that the taxes it paid during the years in question were illegally assessed and collected because O.C.G.A. § 3-4-60, as it existed and was applied during the years in question, was unconstitutional, both in its purpose and effect. Relying on the authority of *Bacchus Imports, Limited v. Dias*, 468 U.S. 263 (1984), Appellant asserted that the unconstitutional purpose and effect of O.C.G.A. § 3-4-60 were to discriminate against out-of-state producers of alcoholic beverages and unfairly to promote local commerce in the form of in-state producers. The unconstitutional purpose and effect were achieved by applying a tax rate to alcoholic beverages manufactured elsewhere and imported into Georgia that was greater than the tax rate applied to in-state producers.

In the *Bacchus* case the United States Supreme Court overturned as unconstitutional a tax imposed by the State of Hawaii identical in operation to O.C.G.A. § 3-4-60. The Hawaii Statute imposed a twenty percent tax on sales of liquor at wholesale; however, certain alcoholic beverages made from locally grown products were exempted from the tax. 468 U.S. at 265. The Supreme Court held that the Hawaii tax was discriminatory and unconstitutional on its face. Therefore, James Beam alleged below, and the trial court so ruled, that O.C.G.A. § 3-4-60, was an unconstitutional infringement upon interstate commerce under *Bacchus*. See generally S.R.-242 *et seq*.

Not only did the trial court hold that the *effect* of the statute was unconstitutionally discriminatory, but also found at paragraph 5 of the Conclusions of Law in the Order, that the purpose/intent of the statute amounted to economic protectionism, *"i.e.*, to benefit local business and local industry". *Id.* at 248.

The purpose or intent of the statute was clearly revealed to the court below by the Appellant through exhibits filed pursuant to the cross motions for summary judgment. See Plaintiff's Response to Defendants' Motion for Summary Judgment, Exhibits "A-3" through "A-13", S.R.-182. These documents, produced by the Appellees after a motion to compel production by the Appellant and pursuant to court order, clearly reflect the intent and purpose of the statute, as expressly noted by the trial court at paragraph 5 of its Order. S.R.-248. For example, in Exhibit "A-6", Tom Crosby, Jr., a member of the Georgia House of Representatives representing District 150, requests an opinion from Attorney General Michael Bowers as to the implications for the Georgia tax in light of *Bacchus*. Representative Crosby admits, in paragraph 2 that, in a manner similar to the statute ruled unconstitutional in *Bacchus*, "Georgia law provides for preferential treatment of alcoholic beverages manufactured in Georgia or made from produce grown in Georgia or both."

A further admission was made by the State through its department of law in the form of a memo from David A. Runnion (Senior Assistant Attorney General) contained in Exhibit "A-7." Mr. Runnion observes that "while not a 100% tax exemption like Hawaii, the lower tax rates for Georgia produced liquor and wine clearly do favor local alcohol industries."

Even more ominous evidence of the unconstitutional animus of the statute was the behind-the-scenes involvement of the local liquor industry in an attempt to preserve their preferential treatment after the *Bacchus* decision. Exhibit "A-10" is a letter to Governor Joe Frank Harris from attorneys at King & Spalding, representing some vested local liquor interests. Section 1 of that letter relates to the legislative history of the statute and notes pointedly that "the purpose of the act was to promote manufacture of liquor and wine in Georgia with Georgia products." The letter also outlines several reasons for maintaining the pre-1975 tax treatment. (The tax was amended in 1985 ostensibly to avoid the effect of *Bacchus*.) One of these was to "[c]ontinue [the] long-standing policy of [the] state not to penalize or increase revenue laws against businesses which have local facilities in the state." Another reason given to maintain the "status quo" was to avoid wiping out the "incentives given for Georgia industries after millions have been invested in reliance on longstanding public policy and revenue laws. . . . "

In short, the trial court properly ruled, pursuant to *Bacchus*, that, since O.C.G.A. § 3-4-60 suffered both from discriminatory effect and purpose with respect to interstate commerce, the statute was unconstitutional. The propriety of that ruling has since been confirmed by subsequent rulings in other states dealing with protectionist statutes. *See, e.g., New Energy Company of Indiana v. Limbach*, ___ U.S. ___, 108 S.Ct. 1803 (1988); *National Distributing Company, Inc. v. State of Florida*, 523 So.2d 156 (1988); *Heublein, Inc. v. Department of Alcoholic Beverage Control of the Commonwealth of Virginia*, Record No. 860321, Supreme Court of Virginia, January 13, 1989; *Russell Stewart Oil Company v. State of Illinois*, 124 Ill.2d 116, 529 N.E.2d 484 (1988).

Despite the propriety of the ruling in the court below as to the constitutionality of the statute, the portion of the court's order giving its ruling prospective application only (S.R.-250 at paragraph 8) was (clearly) erroneous as a matter of law. In fact, O.C.G.A. § 48-2-35 *requires* that the taxes in question be refunded. Thus the Appellant brings this appeal seeking to overturn that portion only of the Order of the Superior Court dated May 27, 1988, which applies the court's ruling non-retroactively.

V. Enumeration of Errors

The trial court erred in its Order dated May 27, 1988 when, in paragraph 8 of that order, it applied prospectively only its ruling that O.C.G.A. § 3-4-60, as applied during the years in question – 1982, 1983 and 1984, constituted a constitutionally impermissible burden on interstate commerce.

VI. Argument and Citation of Authorities

In *Flewellen v. Atlanta Casualty Company*, 250 Ga. 709, 712, 300 S.E.2d 673 (1983), this Court adopted as Georgia law the test set forth by the United States Supreme Court in *Chevron Oil Company v. Huson*, 404 U.S. 97, 92 S.Ct. 349, 355 (1971) for the retroactive application of judicial decisions and held that in deciding whether a court ruling should be applied retroactively a court should:

> (1) Consider whether the decision to be applied non-retroactively established a new principle of law,

either by overruling past precedent on which litigants relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed.

(2) Balance the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, whether retrospective operation would further or retard its operation.

(3) Weigh the inequity imposed by retroactive application, for, if a decision could produce substantial inequitable results if applied retroactively, there is ample basis for avoiding the injustice or hardship by a holding of non-retroactivity."

Clearly the facts before the Court in this case do not warrant a non-retroactive, or prospective only, application of the trial court's ruling that O.C.G.A. § 3-4-60, as applied during the years in question, was unconstitutional. Initially, there is a strong presumption in favor of the retroactive application of any judicial decision. "The overruling of a decision is generally retroactive. . . . " *Preston Carroll Company v. Morrison Assurance Company*, 173 Ga. App. 412, 326 S.E.2d 486 (1985); *rev'd on other grounds;* 254 Ga. 608, 331 S.E.2d 520 (1985). Moreover, the statutory law of the State of Georgia *requires* that the monies illegally and unconstitutionally collected from James Beam be refunded. O.C.G.A. § 48-2-35 reads, in pertinent part, as follows:

(a) A taxpayer shall be refunded any and all taxes or fees which are determined to have been erroneously or illegally assessed and collected from him under the laws of this state, whether paid voluntarily or involuntarily, and shall be refunded interest on the amount of the taxes or fees at the rate of 9 percent per annum from the date of payment of the tax or fee to the commissioner. Refunds shall be drawn from the treasury on warrants of the Governor issued

upon itemized requisitions showing in each instance the person to whom the refund is to be made, the amount of the refund, and the reason for the refund.

The statutory language simply does not admit of judicial discretion to apply decisions prospectively and thereby sidestep the very results mandated by the statute. Indeed, in *Bacchus* the Supreme Court noted that, "given an unconstitutional discrimination, [it may be that] a full refund is mandated by state law." *Bacchus* at 277, n. 14.

Under *Chevron*, and for the sake of discussion ignoring O.C.G.A. § 48-2-35, the only occasion for the court below to have considered limiting its determination that the statutory provisions in question were unconstitutional to a prospective application would be in the event that the decision in *Bacchus Imports, Limited v. Dias* "established a new principle of law". Clearly that was not the case. The United States Supreme Court in *Chevron*, defined what is meant by the establishment of a new principle of law: that the decision to be applied either overruled clear past precedent on which litigants may have relied or decided an issue of first impression "whose resolution was not clearly foreshadowed." *Chevron*, S.Ct. at 355. The decision to be applied by the court below in this case, *i.e., Bacchus* clearly did neither. An examination of the complete text of *Bacchus* shows that no prior decision was overruled. Moreover, *Bacchus* did not deal with an issue of first impression but rather reinforced longstanding precedent that no state may, consistent with the Commerce Clause of the United States Constitution, establish discriminatory, protectionist legislation in favor of local industry.

> A cardinal rule of Commerce Clause jurisprudence is that 'no state, consistent with the Commerce Clause may impose a tax which discriminates against interstate commerce . . . by providing a direct commercial advantage to local business' *Boston Stock Exchange v. State Tax Commission*, 249 U.S. 318, 329 (1977) (quoting *Northwestern State's Portland Cement Company v. Minnesota*, 358 U.S. 450, 458 (1959)).

Bacchus at 268.

In *Bacchus*, the Appellants challenged the constitutionality of a Hawaii tax identical in operation to O.C.G.A. § 3-4-60. The Hawaii statute imposed a twenty percent tax on sales of liquor at wholesale; however, certain alcoholic beverages made from locally grown products were exempted from the tax. 468 U.S. at 265. The Supreme Court held that the Hawaii tax was discriminatory and unconstitutional on its face. The position outlined by the Court in the *Bacchus* decision is simply one of the most recent proclamations of a well established principle.

> Our cases make clear that discrimination between instate and out-of-state goods is as offensive to the Commerce Clause as discrimination between in-state and out-of-state tax payers. Compare *I.M. Darnel & Son Company v. Memphis*, 208 U.S. 113 (1908), with *Maryland v. Louisiana*, 451 U.S. 725 (1981).

Id. at 268, n. 8. (Note that *Darnel* is a *1908* decision).

The Appellees may argue here, as in the trial court, that *Bacchus* constituted a radical departure from prior Supreme Court decisions balancing Twenty-First Amendment considerations against Commerce Clause considerations. See Defendant's brief in support of their motion for summary judgment, S.R.-141, beginning at p.4,

wherein Appellees argued that the 21st Amendment power to regulate alcoholic beverages overcomes any Commerce Clause concerns engendered by O.C.G.A. § 3-4-60 – an argument rejected in *Bacchus*. Appellees cited numerous U.S. Supreme Court decisions in support of this proposition. Those cases, however, give greater weight to Twenty-First Amendment considerations in upholding local statutes regulating alcoholic beverages, but which only *incidentally* affect interstate commerce. *See e.g., State Board of Equalization v. Young's Market Company*, 299 U.S. 59 (1936).

The analysis is different when there is a finding that the effect on Interstate Commerce amounts to economic protectionism and "a finding that state legislation constitutes 'economic protectionism' may be made on the basis of either discriminatory purpose, *see Hunt v. Washington Apple Advertising Comm'n*, 432 U.S. 33, 352-353 (1977), or discriminatory effect, *see Philadelphia v. New Jersey, supra. See also Minnesota v. Cloverleaf Creamery Company, supra*, at 471, n. 15." *Bacchus* at 270. Appellees' argument might claim some (albeit dubious) merit in the context of the amended, post-1985 O.C.G.A. § 3-460, which explicitly purports to serve a constitutionally permissible purpose under the Twenty-First Amendment. Yet here, as in *Bacchus*, the motivation of the state legislature in promulgating and enforcing the statute pre-1985 hardly admits of dispute. Since that purpose was pure economic protectionism, there are no competing Twenty-First Amendment considerations. Viewed in this context, *Bacchus* does not constitute a radical departure from prior precedent, but rather a simple affirmation of a longstanding principle.

Moreover, even were this Court to determine that the situation presented in this case meets the first *Chevron* criterion, both the second and third criteria weigh against prospective application. The second criterion calls for the Court to "weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation.' " *Chevron* S.Ct. at 355, citing *Linkletter v. Walker*, 318 U.S. 618 (1965). The question is not, as Appellees argued below, whether prospectective application would further the purpose of the statute *as amended* in 1985, but whether it would further the purpose of the principle enunciated in the decision to be applied, *i.e., Bacchus*. Appellees' misinterpretation apparently stemmed from their reading of *Federated Mutual Insurance Co. v. DeKalb Co.*, 176 Ga. App 70, 335 S.E.2d 873 (1985), *aff'd*, 255 Ga. 522, 341 S.E.2d 3 (1986). In *Federated* the Georgia Court of Appeals held that *Cotton Mutual Insurance Co. v. DeKalb County*, 251 Ga. 309, 304 S.E.2d 386 (1983), should not be given retroactive effect. The Cotton States decision invalidated the local taxation of insurance premiums. After the decision in *Cotton States*, Federal Mutual brought suit against DeKalb County for a refund of the taxes it had paid. The decision focused on whether prospective application of the decision to be applied (*Cotton States*), would further the purposes of a corrective statute adopted in compliance with *Cotton States*, which were expressly "to avoid a windfall to insurance companies by providing that any recovery must be distributed on a pro rata basis to the policy holders . . . and to protect local governments by assuring that their coffers would not be depleted by tax refund

requests by requiring a written protest." *Federated*, 335 S.E. 2d at 877. Here, there are no such purposes outlined in the "corrective" statute. Moreover, the *Linkletter* decision makes it clear that the focus of this criterion is whether prospective application will further the purposes of the decision to be applied. Obviously, if the Appellees' interpretation is correct, a state could avoid retroactive application of a decision overruling a statute simply by passing corrective legislation outlining an acceptable purpose.

In any event, the clear import of the *Bacchus* decision was to eliminate local economic protectionism and its effects. Since the statute in question and its insidious encroachment on interstate commerce had been in place since the 1930s, the effects have no doubt been far-reaching. In order to further the purposes of promoting interstate commerce outlined in *Bacchus* the competitive balance between in-state and out-of-state manufacturers must be restored; to apply the *Bacchus* decision retroactively in Georgia, providing the Appellant with a not insubstantial refund, which could be passed along to its customers in the form of lower prices, would no doubt further this purpose.

Finally, the third *Chevron* criterion addresses the equities involved in retrospective versus prospective application of the decision to be applied. The Appellees took the position below that the purpose and intent of the statute pre-1985 was to provide revenue for the costs involved in regulating the importation of out-of-state alcoholic beverages. Presumably, the Appellees would have the court believe that this was done on behalf of the taxpayers of the state of Georgia who, were the tax not

borne by the out-of-state sellers and in-state consumers (to whom at least a portion of the tax is perhaps passed along in the form of higher prices), would bear the burden of this regulatory cost. As noted previously, the documents submitted in the trial court by the Appellants pursuant to the summary judgment motions make a sham of this argument. Clearly, the statute was enacted and has been sustained, not on behalf of the taxpayers of the state of Georgia, but on behalf of the vested interests of local distillers (many of which are not even locally owned) and their powerful local lawyers. Viewed in this context, it is difficult to maintain that it would be inequitable to return to the Appellant monies wrongfully appropriated on behalf of another (albeit concealed) vested interest.

In the *Chevron* case the United States Supreme Court focused on the defendant's good faith reliance on a prior consistent interpretation of a law that was overturned. "The most he could do was to rely on the law as it then was. 'We should not indulge in the fiction that the law now announced has always been the law and, therefore, that those who did not avail themselves of it waived their rights.' *Griffin v. Illinois*, 351 U. S. 12, 26 (Frankfurter, concurring in judgment)." *Chevron*, S.Ct. at 356. Conversely, this is not a case where taxes were innocently collected from the Appellant in the good faith belief that this was proper because of the entirely laudable purpose of funding the administrative costs involved in regulating out-of-state alcoholic beverages. Rather, the defendants now seek to hide the protectionist nature of the statute in question behind a newly-discovered and chaste purpose.

Appellees will no doubt argue that recent cases in other states have refused to apply retroactively decisions

similar to that of the trial court in this case involving similar "protectionist" legislation. *See, e.g., DABT, State of Florida v. McKesson Corp.*, 524 So. 2d 1000 (1988); *National Distributing Co., Inc. v. State of Florida*, 523 So.2d 156 (1988). Obviously, these decisions are in no way binding on this Court, and in fact, they provide poor guidance in addressing this issue. The DABT court expressly noted that "we need not determine whether the challenged provisions were in fact enacted to serve some underlying protectionist purpose." *Id.* at 1005. Neither did *National Distributing* involve this particular odious motivation which Appellant has proved to have informed the Georgia statute in question. Thus, again, the "equities" and "good faith" of the State, with which the Florida Supreme Court seemed so acutely concerned in *DABT* and *National Distributing*, give the State little comfort in the present case.

One suspects that the principal "equity" with which the State is concerned in cases such as this is in fact the *inconvenience* of having to refund monies that in all likelihood already have been spent. However, convenience is hardly a sufficient justification for allowing the State and the local liquor industry to keep their ill-gotten gain.

> The use of the prospectivity doctrine detracts attention from the real issues at stake, which are the State's sovereign right to preserve its treasury and the competing interest of taxpayers to a clear and certain remedy for constitutional violations. The complete denial of refunds resolves the tension between these competing interest entirely in favor of the State. Such an unbalanced resolution threatens the very purpose of the commerce clause.

Tatarowicz, *Right to a Refund for Unconstitutionally Discriminatory State Taxes and Other Controversial State Tax Issues Under the Commerce Clause*, 41 Tax Lawyer, 118-119 (Fall 1987).

The so-called prospectivity doctrine is in truth a judicially manufactured scapegoat used by some other states to retain tainted revenue; it would not do honor to the State of Georgia to join that group here, nor would it do justice to the Appellant or its customers in Georgia. When the "equities" are considered, it they are to be considered, the only inequity involved here was the unlawful appropriation of taxes from Appellant James Beam, which monies should be returned.

VI. Conclusion

Appellant submits that the decision of the court below to apply prospectively only its ruling that O.C.G.A. § 3-4-60, as it existed during the years in question, constituted an impermissible burden on Interstate Commerce was improper and erroneous. Appellant further submits that there are no equities weighing in favor of non-retroactive application of the trial court's decision; Appellants should be granted a refund, pursuant to O.C.G.A. § 48-2-35(a), of the taxes improperly and unconstitutionally assessed against and paid by the Appellant.

Respectfully submitted,

SEIGEL, MOSES &
SCHOENSTADT

/s/ Morton Seigel
Morton Seigel

10 East Huron St.
Chicago, Illinois 60611
(312) 664-8998

VINCENT, CHOREY,
TAYLOR & FEIL

/s/ John L. Taylor, Jr.
Ga. State Bar No. 700400

Michael A. Cole
Ga. State Bar No. 177186

1700 The Lenox Building
3399 Peachtree Road
Atlanta, Georgia 30326
(404) 841-3200

CERTIFICATE OF SERVICE

I, Michael A. Cole, hereby certify that I have this day served a copy of the within and foregoing BRIEF OF APPELLANT by depositing a copy of same in the United States mail, postage prepaid as follows:

Jeff L. Milsteen, Esq.
Amelia Waller Baker, Esq.
The Department of Law
132 State Judicial Building
Atlanta, Georgia 30334

This 21 day of February, 1989.

/s/ Michael A. Cole
Michael A. Cole

IN THE SUPREME COURT OF GEORGIA

JAMES B. BEAM DISTILLING CO., a Delaware Corporation,

Appellant,

v.

STATE OF GEORGIA, JOE FRANK HARRIS, Individually and as Governor of the State of Georgia, MARCUS E. COLLINS, Individually and as Georgia State Revenue Commissioner, and CLAUDE L. VICKERS, Individually and as Director of the Fiscal Division of the Department of Administrative Services,

Appellees.

CASE NO. 46642

BRIEF OF APPELLEES

MICHAEL J. BOWERS 071650
Attorney General

H. PERRY MICHAEL 504000
Executive Assistant Attorney General

HARRISON KOHLER 427725
Deputy Attorney General

VERLEY J. SPIVEY 672700
Senior Assistant Attorney General

AMELIA WALLER BAKER 734375
Senior Attorney

PLEASE ADDRESS ALL COMMUNICATIONS TO:

AMELIA WALLER BAKER
Senior Attorney
132 State Judicial Building
Atlanta, Georgia 30334
Telephone: (404) 656-2278

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BRIEF OF APPELLEES

STATEMENT OF JURISDICTION

The Supreme Court of Georgia has jurisdiction on appeal for the reason that this case, in which the constitutionality of a law has been brought into question, is one in which exclusive jurisdiction is vested in the Supreme Court by Art. VI, Sec. VI, Par. II of the Constitution of the State of Georgia of 1983. Furthermore, this case involves taxes imposed on alcoholic beverages by the State of Georgia and therefore, is one involving "state revenue" within the meaning of *Collins v. State*, 239 Ga. 400, 236 S.E.2d 759 (1977).

ISSUE PRESENTED

Whether the trial court was correct in ruling that its decision holding O.C.G.A. § 3-4-60, as codified in 1982,

1983 and 1984, unconstitutional shall apply prospectively only.

STATEMENT OF FACTS

This case involves a challenge to a statute that is no longer in effect. In the trial court below and in this appeal, the Appellant has challenged the constitutionality of O.C.G.A. § 3-4-60, as codified in 1982, 1983 and 1984 (hereinafter "the claim period"), and claimed a refund for taxes allegedly paid under this now repealed statute. (R. 12 through 18.) O.C.G.A. § 3-4-60, as codified during the claim period, imposed taxes on all alcoholic beverages manufactured in or imported into Georgia. Under the provisions of this statute, alcoholic beverages imported into the State by either in-state or out-of-state producers or manufacturers were subject to a higher tax than alcoholic beverages manufactured in Georgia. 1981 Ga. Laws, p. 1269, § 35, O.C.G.A. § 3-4-60 (Michie 1982).

A tax structure similar to that embodied by O.C.G.A. § 3-4-60 has been in effect in Georgia since 1938. The original legislation imposing taxes on alcoholic beverages manufactured and imported into Georgia was enacted in 1938 as Section 11 of the "Revenue Tax Act to Legalize and Control Alcoholic Beverages and Liquors" (hereinafter the "1938 Act"). Ga. Laws 1937-38, Ex. Sess., p. 103.

Enacted not long after the end of Prohibition and the adoption of the Twenty-first Amendment, the 1938 Act was intended to provide for the "taxation, legalization, control, manufacture, importation, distribution, sale and storage of alcoholic beverages." Ga. Laws 1937-38, Ex.

Sess. p. 103. Under Section 11 of this Act, imported alcoholic beverages were subject to a higher tax than alcoholic beverages manufactured in Georgia.

Shortly after its enactment, Section 11 of the 1938 Act, like the statute at issue here, was challenged on the grounds that it violated the Commerce Clause of the Constitution of the United States. In *Scott v. State*, 187 Ga. 702, 2 S.E.2d 65 (1939), *overruled on other grounds, Blackston v. Georgia Department of Natural Resources*, 255 Ga. 15, 334 S.E.2d 679 (1985), this Court upheld the constitutionality of Section 11, finding that it did not violate the Commerce Clause.

Since 1938, the tax system created by Section 11 of the 1938 Act has been amended several times to revise rates and effect other minor changes. The most recent amendment to Section 11 was in 1985, which amendment repealed the statute at issue in this case. The 1985 Amendment, like its predecessors, imposes a higher tax on alcoholic beverages imported into Georgia than on alcoholic beverages manufactured in Georgia. Ga. Laws 1985, p. 665, O.C.G.A. § 3-4-60 (Michie 1988 Supp.).

In April of 1985, the 1985 Amendment was challenged on the grounds that it violated the Commerce Clause and the Equal Protection Clause of the United States Constitution. As in *Scott*, this Court upheld the constitutionality of the 1985 Amendment, finding that it did not violate the Commerce Clause. *Heublein, Inc. v. Georgia*, 256 Ga. 578, 351 S.E.2d 190, *appeal dismissed*, ___ U.S. ___, 107 S.Ct. 3253 (1987).

Also in April of 1985, the Appellant filed a claim with the Georgia Revenue Department for a refund of taxes

allegedly paid pursuant to O.C.G.A. § 3-4-60, as codified during the claim period, challenging therein the constitutionality of the statute. (R. 19 through 20.) On or about April 24, 1987, the Appellant filed this tax refund action pursuant to O.C.G.A. § 48-2-35. (R. 12.) In its Complaint, the Appellant challenged O.C.G.A. § 3-4-60, as codified during the claim period, on the grounds, that its import tax provision (hereinafter "the pre-1985 import tax provision") violated the Commerce Clause and the Equal Protection Clause of the United States Constitution. (R. 12 through 19.)

This matter came before the trial court on cross motions for summary judgment. (R. 242.) After hearing these motions, the Superior Court of Fulton County, on May 27, 1988, entered an order holding O.C.G.A. § 3-4-60, as codified during the claim period, unconstitutional under the Commerce Clause and granting Appellant partial summary judgment. (R. 242, 252.) The trial court made this finding, despite the similarity between O.C.G.A. § 3-4-60, as codified during the claim period, and Section 11 of 1938 Act and the 1985 Amendment upheld by this Court. The Appellees have appealed this ruling of the trial court, which appeal is currently pending before this Court as *State of Georgia, et al. v. James B. Beam Distilling Co.* (Case No. 46681). (Case No. 46681, R. 1.)

Although the trial court found O.C.G.A. § 3-4-60, as codified during the claim period, unconstitutional, it directed that its decision apply prospectively only and that Appellant recover nothing. (R. 252.) It is this ruling to which the Appellant objects in this appeal. As demonstrated below, however, the trial court was correct in

giving its decision prospective effect only and in denying any refund to the Appellant.

ARGUMENT AND CITATION OF AUTHORITIES

Although the trial court erroneously found O.C.G.A. § 3-4-60, as codified during the claim period, to be unconstitutional, it correctly gave its ruling prospective operation. The trial court's decision to give prospective effect to its declaration of unconstitutionality is well supported by case law and by the equities of this case.

In *Great Northern Railroad Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358 (1932), the United States Supreme Court established that courts have the power to fashion their decrees on the constitutionality of statutes in such a manner that those decrees operate only prospectively. Indeed, since the *Sunburst* decision, scores of courts, both federal and state, have given prospective effect only to their decisions, thereby denying relief such as refunds of monies paid to states under statutes found to be unconstitutional. *E.g., Lemon v. Kurtzman*, 411 U.S. 192 (1973) (court denied plaintiff's demand for refund of monies paid under statute allowing public funds to be paid to sectarian schools); *American Trucking Associations v. Gray*, 295 Ark. 43, 746 S.W.2d 377 (Ark. 1988) (out-of-state truckers were not entitled to refund of taxes found violative of the Commerce Clause); *Division of Alcoholic Beverages and Tobacco v. McKesson*, 524 So.2d 1000 (Fla. 1988) (court applied ruling prospectively, thereby denying refund of taxes paid under alcoholic beverage statute); *National Distributing Co. v. Office of the Comptroller*, 523 So.2d 156 (Fla. 1988) (prospective ruling appropriate

where equities weighed against refund of taxes paid under alcoholic beverage statute); *Federated Mutual Insurance Co. v. DeKalb County*, 255 Ga. 522, 341 S.E.2d 3 (1986) (equities favored prospective application and no refund of gross premium taxes); *Metropolitan Life Ins. Co. v. Commissioner of Insurance*, 373 N.W.2d 399 (N.D. 1985) (court denied refund of taxes paid under statute giving domestic insurance companies tax preference).

In the State of Georgia, it is well established that "retroactive application [of a judicial decision] is not compelled constitutionally or otherwise" and should be declined "where unjust results would accrue to those who justifiably relied upon the prior rule." *Federated Mutual Insurance Company v. DeKalb County*, 176 Ga. App. 70, 335 S.E.2d 873 (1985) (citations omitted); *see also Strickland v. Newton County*, 244 Ga. 54, 258 S.E.2d 132 (1979) (decision holding local option sales tax unconstitutional should be applied prospectively to avoid unjust results). *Preston Carroll Co. v. Morrison Assurance Co.*, 173 Ga. App. 412, 414, 326 S.E.2d 486, *reversed on other grounds*, 254 Ga. 608, 301 S.E.2d 520 (1985) (retroactive application of decision would be unjust where there was good faith reliance on challenged law). Indeed, Georgia courts have found that retroactive application should be declined if it "would unjustifiably disrupt existing relationships," particularly where, as here, "there has been a good faith reliance on an unconstitutional statute." *Allan v. Allan*, 236 Ga. 199, 208, 223 S.E.2d 445, 452 (1976).

As noted by the trial court, Georgia courts have adopted the test set forth by the United States Supreme Court in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971) in determining whether a ruling should apply prospectively.

(R. 250.) *Federated Mutual Insurance Co. v. DeKalb County*, 255 Ga. 522, 341 S.E.2d 3 (1986). Under the three-pronged *Chevron Oil* test, a court deciding whether to apply a decision prospectively should:

> (1) Consider whether the decision to be applied non-retroactively established a new principle of law, either by overruling past precedent on which litigants relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed. (2) Balance . . . the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect and whether retrospective operation would further or retard its operation. (3) Weigh the inequity imposed by retroactive application, for, if a decision could produce substantial inequitable results if applied retroactively, there is ample basis for avoiding the injustice or hardship by a holding of non-retroactivity.

Federated Mutual Insurance Co., 176 Ga. App. at 72, 335 S.E.2d at 875 (citations omitted).

In a recent tax refund case very similar to the instant action, this Court and the court of a appeals followed the *Chevron Oil* test in affirming the trial court's ruling that a particular decision should apply prospectively only. *Federated Mutual Insurance Co. v. DeKalb County*, 255 Ga. 522, 341 S.E.2d 3 (1986); *Federated Mutual Insurance Co. v. DeKalb County*, 176 Ga. App. 70, 335 S.E.2d 873 (1985). The plaintiff in *Federated Mutual* sought a refund of gross premium taxes paid pursuant to a county ordinance that had been declared invalid by an earlier decision – *i.e.*, the *Cotton States* decision.

In applying the first prong of the *Chevron Oil* test, the court of appeals concluded that prospective application

was appropriate because the *Cotton States* opinion decided an issue of first impression. In reaching this conclusion, the court noted that insurance companies had paid the taxes at issue for almost 24 years without ever challenging the validity of the county ordinance. 176 Ga. App. at 74, 355 S.E.2d at 876.

Under the second prong of the test, the court of appeals decided in favor of prospective application on the grounds that it would further the purpose of amendments passed since the *Cotton States* decision and avoid the imposition of a severe economic burden on local governments. With respect to the burden refund payments would impose on local governments, the court noted that:

> [I]t is apparent that local governments would be required to refund large sums of money for which the funds may not now be available. The fact that the sums could amount to millions of dollars could present a financial stability problem for those local governments required to make such refunds, and could cause local governments to increase taxation and/or reduce existing services.

176 Ga. App. at 75, 335 S.E.2d at 877.

Under the final prong of the *Chevron Oil* test, the court of appeals determined that the equities clearly favored prospective application. In reaching this conclusion, the court found not only that the county had collected the taxes in good faith, but also that the taxpayer had passed on the tax to its customers. 176 Ga. App. at 76, 355 S.E.2d at 877-78.

As in *Federated Mutual*, an application of the *Chevron Oil* test to this case clearly demonstrates that the trial court was correct in giving its decision prospective effect only. Prospective application of the trial court's decision would not only further the purposes of the current alcoholic beverage tax statute, but would also prevent unjust results to those who reasonably relied on O.C.G.A. § 3-4-60, as codified during the claim period.

In applying the first prong of the *Chevron Oil* test to this case, it is clear that the decision of the trial court "establish[ed] a new principle of law by overruling a past statute on which [Appellees] relied." (R. 251.) Prior to the trial court's decision, the Appellees reasonably relied on case law upholding the constitutionality of Georgia's pre-1985 import tax. Indeed, in 1939, this Court, relying on United States Supreme Court decisions, upheld the constitutionality of the original import tax provision enacted in 1938 against a Commerce Clause challenge. *Scott v. The State*, 187 Ga. 702, 2 S.E.2d 65 (1939), *overruled on different grounds, Blackston v. Georgia Department of Natural Resources*, 255 Ga. 15, 334 S.E.2d 679 (1985) (the right of the State to regulate the importation of intoxicating liquor is not prohibited by the Commerce Clause). After the decision in *Scott*, the import tax was not challenged again until April of 1985, some fifty years later, when the Appellant filed its refund claim and the Plaintiff in *Heublein* initiated its unsuccessful lawsuit against the 1985 Amendment. During essentially the entire claim period, therefore, the Appellees had no reason to believe that the pre-1985 import taxes were unconstitutional.[1]

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[1] Even in June of 1984 when the Supreme Court rendered its decision in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984),

(Continued on following page)

Like the county government in *Federated Mutual*, the Appellees in good faith relied on the constitutionality of the pre-1985 import tax provision and used the money collected for public programs.

With respect to the second prong of the *Chevron Oil* test, the trial court properly found that it was unnecessary to engage in a weighing of the merits and demerits of the prospective operation of its decision, since the statute at issue was repealed in 1985 (R. 251). Even if the second prong of the *Chevron Oil* test were applied in this case, however, prospective application of the trial court's decision would be favored. As in *Federated Mutual*, a weighing of the merits would disfavor a retroactive application because it would require Georgia to refund large sums of money for which the funds are no longer available. The amount of tax refund that the Appellant alone is requesting is approximately 2.4 million dollars. In addition to the Appellant's claim, there are two other lawsuits currently pending in which claimants, represented by the same attorneys as the Appellant here, seek refunds of approximately 28 million dollars.[2] In light of presently pending claims of some 30 million dollars and the potential for other claims, a retroactive application of the trial court's

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it was not clear that Georgia's law was problematic as it differed in many respects from the Hawaii statute.

[2] The other pending tax refund actions are: *Heublein, Inc. v. Georgia*, Civil Action No. 87-3542-6 (DeKalb Superior Court) filed April 24, 1987; *Joseph E. Seagram & Sons, Inc. v. Georgia*, Civil Action No. 87-7070-8 (DeKalb Superior Court) filed September 4, 1987.

decision would produce severe financial consequences for Georgia.

Furthermore, the imposition of such a financial burden on the State would not further the purpose of the current import tax provision, which has been declared constitutional by this Court. *Heublein, Inc. v. Georgia*, 256 Ga. 578, 351 S.E.2d 190 (1987). The Georgia legislature amended the pre-1985 import tax provision after the Supreme Court decision in *Bacchus* and in so doing stated that one of the purposes of the 1985 Amendment was to help defray the high cost of regulating the importation of alcoholic beverages. A refund of taxes to the Appellant or any other importer, therefore, would clearly not be consistent with the express purpose and findings underlying the 1985 Amendment.

Finally, a balancing of the equities in this case favors prospective application in order to avoid unjust results to those who justifiably relied on the pre-1985 import tax provision. As in *Federated Mutual*, the State of Georgia collected the taxes at issue in good faith reliance that Georgia's import tax provision – which had been upheld by this Court – was constitutional. As noted by both the United States Supreme Court and this Court, protecting reasonable reliance upon a statute is an important and a valid concern, even where "that requires allowing an unconstitutional statute to remain in effect for a limited period of time." *Heckler v. Mathews*, 465 U.S. 728, 746 (1984); *see also Allan v. Allan*, 236 Ga. 199, 223 S.E.2d 445 (1976).

Moreover, prospective application would avoid the extreme financial burden and disruption that would be

created if the State were required to raise money to pay some 30 million dollars or more in tax refunds at a time when the State is struggling to find revenues to pay for billions of dollars in infrastructure needs. Such financial pressure and disruption would clearly not be justified where the taxes were collected and spent in good faith and the Appellant most likely passed on the cost of the taxes to its customers. Indeed, a retroactive application might very well result in a windfall to the Appellant and other claimants, who are seeking a total absolution of tax liability for three years. In short, the trial court correctly found that the equities in this case favor the prospective application of its decision.

Reasoning very similar to that found in the trial court's order is also found in two recent decisions by Florida Supreme Court. *Division of Alcoholic Beverages and Tobacco v. McKesson*, 524 So.2d 1000 (Fla. 1988); *National Distributing Co. v. Office of the Comptroller*, 523 So.2d 156 (Fla. 1988). In both of these cases, the Florida Supreme Court ruled that equitable considerations favored the prospective application of trial court decisions holding certain of Florida's alcoholic beverage tax statutes unconstitutional under the Commerce Clause. In both *McKesson* and *National Distributing Co.*, the Florida Supreme Court found, as did the trial court in this matter, that prospective operation was appropriate because Florida had relied in good faith on presumptively valid statutes, the funds collected had been expended, and the taxpayers had in all likelihood passed on the excess taxes to their customers. *McKesson*, 524 So.2d at 1010; *National Distributing Co.*, 523 So.2d at 158. In *National Distributing Co.*, the court also

noted that "unreasonable disruption of state government" would be caused by a retroactive application and that any benefits of a refund to the taxpayer were "far outweighed by the harm that would be inflicted upon [the] state's citizens and government." *National Distributing Co.*, 523 So.2d at 158.

As in the *McKesson* and *National Distributing Co.* cases, the equitable considerations in this case weigh strongly in favor of prospective application of the trial court's decision. Given the State's good faith reliance on O.C.G.A. § 3-4-60 and the severe burden a tax refund would impose on the citizens and government of this State, the trial court correctly ruled that its decision should apply prospectively only.

CONCLUSION

For the reasons set forth above, the Appellee respectfully requests that the Court affirm that part of the Superior Court's May 27, 1988 Order giving its holding of unconstitutionality prospective application only.

This 13th day of March, 1989.

Respectfully submitted,

MICHAEL J. BOWERS 071650
Attorney General

H. PERRY MICHAEL 504000
Executive Assistant Attorney General

(Signatures continued on next page)

/s/ Harrison Kohler
HARRISON KOHLER 427725
Deputy Attorney General

/s/ Verley J. Spivey
VERLEY J. SPIVEY 672700
Senior Assistant Attorney General

/s/ Amelia Waller Baker
AMELIA WALLER BAKER 734375
Senior Attorney

PLEASE ADDRESS ALL
COMMUNICATIONS TO:

AMELIA WALLER BAKER
Senior Attorney
132 State Judicial Building
Atlanta, Georgia 30334
Telephone: (404) 656-2278

CERTIFICATE OF SERVICE

I do hereby certify that I have this date served a copy of the foregoing BRIEF OF APPELLEES upon:

John L. Taylor, Jr.
Michael Cole
Vincent, Chorey, Taylor & Feil
A Professional Corporation
1700 The Lenox Building
3399 Peachtree Road, N.E.
Atlanta, Georgia 30326

by placing the same into the United States mail with adequate first class postage placed thereon.

This 13th day of March, 1989.

/s/ Amelia Waller Baker
AMELIA WALLER BAKER
Senior Attorney

IN THE SUPREME COURT
FOR THE STATE OF GEORGIA

COMBINED CASE NOS. 46642 AND 46681

JAMES B. BEAM DISTILLING CO.,

Appellant/Appellee

v.

STATE OF GEORGIA, JOE FRANK HARRIS, individually and as Governor of the State of Georgia, MARCUS E. COLLINS, individually and as Georgia State Revenue Commissioner, and CLAUDE L. VICKERS, individually and as Director of the Fiscal Division of the Department of Administrative Services,

Appellees/Appellants,

SUPPLEMENTAL BRIEF OF APPELLANT

COUNSEL OF RECORD:

MORTON SIEGEL
SIEGEL, MOSES & SCHOENSTADT
10 EAST HURON
CHICAGO, ILLINOIS 60611
TELEPHONE: 312/664-8998

ADDITIONAL COUNSEL:

JOHN L. TAYLOR, JR.
MICHAEL A. COLE
VINCENT, CHOREY, TAYLOR & FEIL
A PROFESSIONAL CORPORATION
THE LENOX BUILDING, SUITE 1700
3399 PEACHTREE ROAD, N.E.
ATLANTA, GEORGIA 30326
TELEPHONE: 404/841-3200

IN THE SUPREME COURT
FOR THE STATE OF GEORGIA

JAMES B. BEAM DISTILLING CO.,	:	
Appellant/Appellee	:	COMBINED CASE NOS. 46642 and 46681
v.	:	
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Appellees/Appellants	:	

SUPPLEMENTAL BRIEF OF APPELLANT

COUNSEL OF RECORD:
MORTON SIEGEL
SIEGEL, MOSES & SCHOENSTADT
10 EAST HURON
CHICAGO, ILLINOIS 60611
TELEPHONE: 312/664-8998

ADDITIONAL COUNSEL:
JOHN L. TAYLOR, JR.
MICHAEL A. COLE
VINCENT, CHOREY, TAYLOR & FEIL
A PROFESSIONAL CORPORATION
THE LENOX BUILDING, SUITE 1700
3399 PEACHTREE ROAD, N.E.
ATLANTA, GEORGIA 30326
TELEPHONE: 404/841-3200

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Appellees	:	

SUPPLEMENTAL BRIEF OF APPELLANT

I. STATEMENT OF THE CASE/STATEMENT OF FACTS

This appeal arises out of the trial court's order of May 27, 1988 declaring unconstitutional O.C.G.A. § 3-4-60, as codified during the years in question – 1982, 1983 and 1984. The statute grants preferential taxing treatment of alcoholic beverages manufactured from Georgia grown products in contravention of *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 104 S. Ct. 3049 (1984). The two separate appeals from this ruling of the trial court require this Court to address two separate issues: (1) whether the trial court was correct in ruling that the statute in question, which taxes alcoholic beverages manufactured outside the State of Georgia at twice the rate of

in-state manufactured beverages, constitutes a violation of the commerce clause of the United States Constitution, and (2) if so, whether the Appellant James B. Beam Distilling Company is entitled to a refund of the taxes paid pursuant to the unconstitutional statute.

A detailed recounting of the facts is provided in the briefs already on file with the Court in both appeals, which were heard in oral argument before this Court on May 9, 1989. Appellant James B. Beam Distilling Company submits this its Supplemental Brief pursuant to Rule 41 of the Rules of the Supreme Court of the State of Georgia to address and highlight some of the issues raised during oral argument.

II. ARGUMENT AND CITATION OF AUTHORITIES

A. The Burden of Proof with Respect to the Purpose of the Statute Rests With the Appellees.

Much was made during the oral presentation of the issues in these appeals of the purpose of the statute. Particularly, the Court inquired as to which side had the burden of proof to demonstrate whether the purpose of the statute was a legitimate one that would pass muster under commerce clause analysis, or "simple economic protectionism," which clearly would require the statute to be struck down under *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 104 S. Ct. 3049 (1984), discussed at length in the briefs already on file with the Court. Clearly and incontrovertibly, that burden rests with the Appellees.

> The burden of showing discrimination rests on the party challenging the validity of the statute. *Hughes v. Oklahoma*, 441 U.S. 322, 336, 99 S. Ct. 1727, 1736, 60 L.Ed.2d 250 (1979). Once discrimination is demonstrated, however, "the burden falls on the State to justify it both in terms of the local benefits flowing from the statute and the unavailability of non-discriminatory alternatives adequate to preserve the local interests at stake." *Id.* (quoting *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 353, 97 S. Ct. 2434, 2446, 53 L.Ed. 2d 383 (1977)). *"At a minimum . . . facial discrimination involves the strictest scrutiny of any purported legitimate local purpose* and the absence of nondiscriminatory alternatives." *Hughes*, 441 U.S. at 337, 99 S. Ct. at 1737. Stated differently, the State must demonstrate a "close fit" between the burden on interstate commerce and the asserted local purpose. *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941, 957, 102 S. Ct. 3456, 3464, 73 L. Ed.2d 1254 (1982).
>
> *Norfolk Southern Corporation v. Oberly*, 632 F. Supp. 1225, 1232-33 (D. Del. 1986), *aff'd*, 822 F.2d 388 (3d Cir. 1987) (emphasis supplied).

That the statute in question is discriminatory on its face satisfies Appellant's burden "of showing discrimination." *See Hughes v. Oklahoma*, 441 U.S. 322, 99 S. Ct. 1727, 1736-37 (1979). *See also Sporhase v. Nebraska*, 102 S. Ct. at 3465 ("The State therefore bears the initial burden of demonstrating a close fit. . . . ") In short, facial discrimination, absent at least a pretextual justification by the State, sounds the death knell for a statute affecting interstate commerce. In fact, in almost every instance where the Supreme Court has considered a facially discriminatory statute in a commerce clause context, the statute has failed to pass muster. *See e.g., South-Central Timber Development, Inc. v. Wunnicke*, 467 U.S. 82, 104 S. Ct. 2237

(1984); *Sporhase v. Nebraska; Hughes v. Oklahoma: Philadelphia v. New Jersey*, 437 U.S. 617, 98 S. Ct. 2531 (1978); *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 90 S. Ct. 844 (1970).

Appellees seek comfort from the Supreme Court's near unremitting hostility toward facially discriminatory legislation in *State Board of Equalization of California v. Young's Market Company*, 299 U.S. 59, 57 S. Ct. 77 (1936). Appellees in effect argue that, because of the special interest in regulating alcoholic beverages accorded the states under the Twenty First Amendment, Appellees are protected from the intense scrutiny given facially discriminatory statutes. *See* Brief of Appellants in case No. 46681 at p. 9. First, the *Bacchus* decision directly contradicts any such inference to be drawn from *Young's Market*. Appellees seek to explain away this roadblock in their argument by insisting that the Supreme Court gave the Twenty First Amendment argument short shrift in *Bacchus* because the State of Hawaii waited until the last minute to make the argument. However, nothing in the *Bacchus* decision in any way indicates that Hawaii's tardiness impacted on the Court's decision; the Supreme Court simply rejected the notion that the Twenty First Amendment somehow exempts facially discriminatory statutes regulating alcohol from commerce clause sanction.

Moreover, Appellees' reliance on *Young's Market* is misplaced. Plaintiffs in the *Young's Market* decision argued that *any* license fee imposed upon the importation of alcohol manufactured outside the state was *per se* invalid under the commerce clause:

> What the plaintiffs complain of is the refusal to let them import beer without paying for the privilege of importation. Prior to the Twenty-First Amendment . . . [the] imposition would have been void, not because it resulted in discrimination, but because the fee would be a direct burden on interstate commerce.

299 U.S. at 78.

In rejecting Plaintiff's argument in *Young's Market*, the Supreme Court simply followed the longstanding proposition that, provided the state interest is legitimate (*i.e.*, regulating alcohol under the Twenty First Amendment) a statute may impose incidental burdens upon interstate commerce. Beyond this, though *Young's Market* has never been expressly overruled, it clearly has been confined to its narrow facts. *See Bacchus*, 468 U.S. at 274, esp. n. 13. Clearly, the law in this respect is that where a State law impacting on interstate commerce does not regulate evenhandedly, the State must justify the disparity under a standard of strict scrutiny. *See Hughes v. Oklahoma*. *See also Norfolk Southern Corp. v. Oberly*, 822 F.2d at 401 and n. 18.

Thus, when faced with the irrefutable facially discriminatory nature of the statute in question, it became incumbent upon the State to come forward with evidence of a "close fit" between the burden on interstate commerce and the asserted local purpose. *Sporhase v. Nebraska ex rel. Douglas*, 102 S. Ct. at 3465. In the face of that burden, the Appellees presented *no evidence* indicating that it costs twice as much to regulate out-of-state alcoholic beverages as in-state beverages. In fact, the Appellees presented *no evidence at all* on this issue.

While Appellees contend that they presented evidence, in the form of legislative history, of the *purpose* of

the statute, this is not the "close fit" evidence required. Appellees assert that "the 1938 Act was intended 'to provide for the taxation, legalization, control, manufacture, importation, distribution, sale and storage of alcoholic beverages.' Ga. Laws 1937-38 Ex. Sess., p. 103.' " Brief of Appellants at p.3. However, when considering the purpose of a challenged statute, "this Court is not bound by '[t]he name, description or characterization given it by the legislature or the courts of the State, but will determine for itself the practical impact of the law.' " *Hughes v. Oklahoma*, 441 U.S at 336, 99 S. Ct. at 1736 (citation omitted). The following excerpt from the *Hughes* case succinctly summarizes the compelling argument for the unconstitutionality of the statute in question:

> Section 4-115(B) on its face discriminates against interstate commerce. It forbids the transportation of natural minnows out of the State for purposes of sale, and thus "overtly blocks the flow of interstate commerce at [the] State's borders." *Philadelphia v. New Jersey*, 437 U.S., at 624, 98 S. Ct., at 2535. Such facial discrimination by itself may be a fatal defect, regardless of the State's purpose, because "the evil of protectionism can reside in legislative means as well as legislative ends." *Id.*, 437 U.S. at 626, 98 S. Ct., at 2537. *At a minimum such facial discrimination invokes the strictest scrutiny* of any purported legitimate local purpose and of the absence of non-discriminatory alternatives.

441 U.S. at 336-37, 99 S. Ct. at 1736-37 (emphasis supplied).

From the foregoing, it is evident that no real inquiry into the *purpose* of the statute in question is even necessary to decide this case. "[A] discriminatory effect, as

distinct for [sic] incidental burden, evidences *purposeful* discrimination." *Norfolk Southern Corp. v. Oberly*, 822 F.2d at 401, n. 18 (emphasis in original). In fact, it is plain on the face of the *Bacchus* decision that the stricture of the commerce clause applies to statutes that are discriminatory in their purpose or effect. *Bacchus*, 468 U.S. at 270 ("a finding that State Legislation constitutes 'economic protectionism' may be made on the basis of either discriminatory purpose . . . or discriminatory effect. . . . ") *See Heublein, Inc. v. State*, 256 Ga. 578 (1987) (expressly noting the *Bacchus* holding that a commerce clause violation can be made "on the basis of either discriminatory purpose or discriminatory effect").

However, even delving into the purpose of the statute yields no consolation for the Appellees. Appellees seek to put blinders on the Court and would have it view the statute with tunnel vision, offering up the facile proposition that the stated purpose of the statute in 1938 was "to provide for the taxation, legalization, control, manufacture, importation, distribution, sale and storage of alcoholic beverages." This is not a legislative history, but rather a simple statement of purpose and, as noted in *Hughes v. Oklahoma*, the Supreme Court gives short shrift to the idea that a pretextual stated purpose can salvage a facially discriminatory statute from commerce clause scrutiny.[1]

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[1] For examples of the types of legislative history courts consider in determining statutory purpose in this context, *see e.g., Norfolk Southern Corporation v. Oberly*, 822 F.2d 388 (3rd Cir. 1987); *Baltimore Gas & Electric Company v. Heintz*, 760 F.2d 1408 (4th Cir. 1985).

In the absence of a clear legislative history or, as in this case, in the absence of *any* legislative history, the courts look "to the interpretation given the statute by those charged with administering it." *Baltimore Gas & Electric Company v. Heintz*, 760 F.2d 1408 (4th Cir. 1985). *See also Brothers v. First Leasing*, 724 F.2d 789, 792 (9th Cir. 1984). Despite the absence of any burden to do so, the Plaintiff has offered unrebutted evidence from the mouths of those charged with administering the statute in question, *i.e.*, the Georgia Department of Revenue, Alcohol and Tobacco Unit. For example, Plaintiff's Exhibit "A-4" is a document generated by the Revenue Department, and plainly states that "on one bushel of grain a Georgia distiller using Georgia-grown products receives *preferential tax treatment* of $11.50 or on average $7.50 more than the cost of the grain" and goes on to outline and analyze the benefit derived from local manufacturers as a result of the preferential tax treatment. (Emphasis supplied.) Exhibit "A-5", again produced by the Alcohol and Tobacco Tax Unit of the Revenue Department, addresses the "preferential alcohol excise tax" and discusses a proposal to eliminate the tax (presumably because of *Bacchus*), and the implications of such a proposal. In short, the *Appellees* bore the burden to show in the trial court that the statute served a legitimate state purpose and, given its facially discriminatory nature, served that purpose using the least discriminatory alternative. In the face of that burden, Appellees presented no evidence, and the Appellant in fact presented compelling evidence to the contrary.

B. The Georgia State Legislature has Mandated a Refund of the Taxes Paid Under O.C.G.A. § 48-2-35

There simply is no doubt that the statute in question is unconstitutional under *Bacchus* (tacitly admitted by the State when the statute was amended in 1985 in the wake of *Bacchus*). The only real question for decision by this Court is whether, given the unconstitutionally discriminatory nature of the statute, a rebate is mandated. However, the General Assembly has already decided this question through the enactment of a mandatory state law. As noted by the Court in *Bacchus*, "[i]t may be, for example, that given an unconstitutional discrimination, a full refund is mandated by State law." 468 U.S. at 277, n. 14. In this case, a refund *is* mandated through an unambiguous state law enacted by the General Assembly. *See* O.C.G.A. § 48-2-35 ("A taxpayer *shall* be refunded . . . ") discussed at length in Appellant's Brief and during oral argument. Thus, Appellees' arguments with respect to "weighing equities," the State's good faith reliance on *Young's Market*, and so forth, under *Chevron Oil Company v. Huson*, 404 U.S. 97, 92 S. Ct. 349 (1971), are totally irrelevant.

Of novel interest only is Appellees' argument that the taxes collected under the statute in question were not "erroneously or illegally assessed" until the statute was declared unconstitutional by the trial court. This argument was made during oral presentation without full consideration of its implications. If this argument is accepted, O.C.G.A. § 48-3-25 becomes a nullity in that no refund would *ever* be granted under the statute since presumably the right to a refund would not accrue until

after the tax has been declared illegal, at which point there would be nothing to refund. Likewise, as was observed in oral argument, no taxes would ever be refunded if the State could argue, as here, that they've spent the money and need it to fund other state services. In view of the obvious consequences of the mandatory nature of O.C.G.A. § 48-2-35 for Appellees' case, counsel for Appellees surely is to be applauded for a gallant effort, but surely such circular reasoning does not merit serious consideration. The General Assembly's enactment is binding, and the courts should not engage in the judicial repeal of a valid statute.

CONCLUSION

For the foregoing reasons, and further for those reasons stated in Appellants' initial and answer briefs in the underlying appeals, Appellant James B. Beam Distilling Company respectfully submits that the trial court's ruling declaring unconstitutional O.C.G.A. § 3-4-60, as it existed prior to 1985, must be upheld and, under the dictate of O.C.G.A. § 48-2-35, Appellant must be granted a full refund of the taxes paid during the years 1982, 1983 and 1984.

Respectfully submitted,

_____

Attorneys for James B. Beam Distilling Co.

OF COUNSEL:

/s/ Morton Seigel
Morton Seigel
Seigel, Moses & Schoenstadt
10 East Huron Street
Chicago, Illinois 60611

/s/ John L. Taylor, Jr.
John L. Taylor, Jr.
Michael A. Cole
Vincent, Chorey, Taylor & Feil
1700 The Lenox Building
3399 Peachtree Road
Atlanta, Georgia 30326

CERTIFICATE OF SERVICE

I, Michael A. Cole, hereby certify that I have this day served a copy of the within and foregoing SUPPLEMENTAL BRIEF OF APPELLANT by depositing a copy of same in the United States mail, postage prepaid as follows:

Jeff L. Milsteen, Esq.
Amelia Waller Baker, Esq.
The Department of Law
132 State Judicial Building
Atlanta, Georgia 30334

This 17 day of May, 1989.

/s/ Michael A. Cole
Michael A. Cole

_____

IN THE SUPREME COURT OF GEORGIA

JAMES B. BEAM DISTILLING CO., a Delaware Corporation, Appellant, v. STATE OF GEORGIA, *et al.*, Appellees.	*	CASE NO. 46642
STATE OF GEORGIA, *et al.*, Cross-Appellants, v. JAMES B. BEAM DISTILLING CO., a Delaware Corporation, Cross-Appellee.	*	CASE NO. 46681

SUPPLEMENTAL BRIEF OF APPELLEES
AND CROSS-APPELLANTS

MICHAEL J. BOWERS 071650
Attorney General

H. PERRY MICHAEL 504000
Executive Assistant Attorney General

HARRISON KOHLER 427725
Deputy Attorney General

VERLEY J. SPIVEY 672700
Senior Assistant Attorney General

AMELIA WALLER BAKER 734375
Staff Attorney

PLEASE ADDRESS ALL
COMMUNICATIONS TO:

AMELIA WALLER BAKER
Staff Attorney

132 State Judicial Building
Atlanta, Georgia 30334
Telephone: (404) 656-2278

IN THE SUPREME COURT OF GEORGIA

JAMES B. BEAM DISTILLING CO., a Delaware Corporation, Appellant, v. STATE OF GEORGIA, *et al.*, Appellees.	*	CASE NO. 46642
STATE OF GEORGIA, *et al.*, Cross-Appellants, v. JAMES B. BEAM DISTILLING CO., a Delaware Corporation, Cross-Appellee.	*	CASE NO. 46681

SUPPLEMENTAL BRIEF OF APPELLEES
AND CROSS-APPELLANTS

INTRODUCTION

The above-referenced appeals arise out of a trial court order of May 27, 1988 declaring unconstitutional O.C.G.A. § 3-4-60, as codified in 1982, 1983 and 1984, and directing that this decision apply prospectively only. After the filing of briefs in these appeals, this Court heard oral argument on both appeals on May 9, 1989. Pursuant to Rule 41 of the Rules of the Supreme Court of Georgia, the State of Georgia, Joe Frank Harris, Marcus E. Collins and Claude L. Vickers, Appellees and Cross-Appellants

in the above-styled appeals (hereinafter the "Appellees"), hereby file this supplemental brief to address some of the issues raised during oral argument and raised by the supplemental brief of Appellant James B. Beam Distilling Company (hereinafter the "Appellant").

ARGUMENT AND CITATION OF AUTHORITIES

A. THE APPELLANT BEARS THE BURDEN OF ESTABLISHING THAT O.C.G.A. § 3-4-60, AS CODIFIED IN 1982, 1983 AND 1984, IS UNCONSTITUTIONAL.

In oral argument and in its briefs filed with this Court, the Appellant has repeatedly attempted to convince this Court that it should apply a standard of review and burden of proof that is wholly inappropriate in cases involving the Twenty-first Amendment. Despite the recognition by this Court in *Heublein, Inc. v. Georgia*, 256 Ga. 578, 351 S.E.2d 190, *appeal dismissed*, ___ U.S. ___, 107 Sup. Ct. 3253 (1987) that a strict commerce clause analysis does not apply in cases in which the principles of the Twenty-first Amendment are involved, such as here, the Appellant continues to argue and recite to this Court traditional commerce clause cases that do not involve the Twenty-first Amendment. Indeed, in its supplemental brief submitted to this Court, the Appellant cites no cases involving the interplay of the commerce clause and the Twenty-first Amendment in support of its argument that the Appellees bear the burden of demonstrating the validity of O.C.G.A. § 3-4-60, as codified in 1982, 1983, and 1984 (hereinafter the "pre-1985 import tax statute").

The Appellant cites no such cases because both the cases of this Court and of the Supreme Court establish that a different analysis is applicable in cases involving the Twenty-first Amendment. *See Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984); *Joseph E. Seagram & Sons v. Hostetter*, 384 U.S. 35 (1966); *State Board of Equalization v. Young's Market Co.*, 299 U.S. 59 (1936); *Heublein, Inc. v. Georgia*, 256 Ga. 578, 351 S.E.2d 190 (1987); *Scott v. State*, 187 Ga. 702, 2 S.E.2d 65 (1939), *overruled on other grounds, Blackston v. Georgia Department of Natural Resources*, 255 Ga. 15, 334 S.E.2d 679 (1985). As discussed extensively in briefs filed by Appellees in this matter, this Court in *Heublein* and the Supreme Court in *Bacchus* stated that the test that should be applied in cases such as this is whether the taxes at issue sufficiently implicate central concerns of the Twenty-first Amendment so as to outweigh any commerce clause principles that might otherwise be offended.

Under this correct standard of review, it is clear that the statute at issue is constitutional as it does address central concerns of the Twenty-first Amendment. Indeed, the legislative history of the pre-1985 import tax statute expressly states that the statute was intended to provide for the regulation and control of alcoholic beverages, including their importation. Ga. Laws 1937-38, Ex. Sess. p. 103. The express purposes of the pre-1985 import tax, therefore, fall squarely within the central concerns of the Twenty-first Amendment.*

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*On the contrary, the legislative history of the statute that was struck down in *Bacchus* expressly stated that the purpose of the statute was to foster local industry.

Where the statute at issue involves central concerns of the Twenty-first Amendment, such as here, the challenging party clearly bears the burden of establishing with competent evidence the invalidity of the statute. *See, e.g., Allstate Beer, Inc. v. Julius Wile Sons & Co.*, 479 F. Supp. 605, 610 (N.D. Ga. 1979) (only a "clear showing of arbitrariness would allow a court to substitute its judgment for that of the state legislature in the area of regulation of alcoholic beverages"); *Bartow Co. Bank v. Bartow Co. Board of Tax Assessors*, 251 Ga. 831, 312 S.E.2d 102 (1984) (court will not declare a statute void except in clear and urgent case); *Bohannan v. Duncan*, 185 Ga. 840, 196 S.E.2d 897 (1938) (burden of establishing invalidity of statute is on the attacking party). The Appellant, however, totally failed to meet this burden of proof in that it presented no competent evidence to the trial court to establish that the pre-1985 import tax statute does not involve central concerns of the Twenty-first Amendment.

Furthermore, contrary to the Appellant's assertions, it did not meet its burden of proof by showing that the statute at issue is discriminatory on its face. Indeed, if the Appellant's reasoning were correct, this Court would not have upheld the constitutionality of the current import tax statute in *Heublein*. The current import tax statute, like the pre-1985 import tax statute, on its face imposes a higher tax on alcoholic beverages imported into the State of Georgia than on alcoholic beverages manufactured in the State of Georgia. Although this differentiation in taxation might not be permissible under a traditional commerce clause analysis, as argued by the Appellant, this Court found in *Heublein* that a different treatment of imported and locally manufactured alcoholic beverages is

permitted where central concerns of the Twenty-first Amendment are involved. *See also State Board of Equalization v. Young's Market Co.*, 279 U.S. 59 (1936).

In short, the Appellant fails to recognize that a traditional commerce clause analysis is not appropriate in a case such as this where central concerns of the Twenty-first Amendment are involved. The Appellant continues to cling to traditional commerce clause cases and analysis and to ignore the line of Supreme Court cases establishing that the Twenty-first Amendment removes traditional commerce clause restraints on states when they act to control the importation of alcoholic beverages. It is the Twenty-first Amendment, however, that saves provisions like Georgia's pre-1985 import tax that might otherwise be unconstitutional under a pure commerce clause analysis. Under the analysis set forth in *Bacchus* and in *Heublein*, Georgia's pre-1985 import tax provision is a constitutional exercise of the State's Twenty-first Amendment powers and should be upheld.

B. TRIAL COURT CORRECTLY GAVE ITS RULING PROSPECTIVE EFFECT ONLY.

Although the trial court erroneously found O.C.G.A. § 3-4-60, as codified during the claim period, to be unconstitutional, it correctly gave its ruling prospective effect only. As discussed at length in Appellees' briefs in this case, it is well established that courts have the power to fashion their decrees on the constitutionality of statutes in such a manner that those decrees operate only prospectively. *Lemon v. Kurtzman*, 411 U.S. 192 (1973); *Great Northern Railroad Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358

(1932); *Federated Mutual Ins. Co. v. DeKalb County*, 255 Ga. 522, 341 S.E.2d 3 (1986); *Preston Carroll Co. v. Morrison Assurance Co.*, 173 Ga. App. 412, 414, 326 S.E.2d 486, *reversed on other grounds*, 254 Ga. 608, 331 S.E.2d 520 (1985); *Allan v. Allan*, 236 Ga. 199, 208, 223 S.E.2d 445, 452 (1976). Furthermore, this Court has specifically recognized that in a tax refund case a court may give its ruling prospective effect only and thereby deny a tax refund. *Federated Mutual Ins. Co. v. DeKalb County*, 255 Ga. 522, 341 S.E.2d 3 (1986) (equities favored prospective application and no refund of gross premium taxes). Indeed, there is no authority to suggest that the trial court in this case did not have the authority to give its ruling prospective effect only.

Faced with clear and abundant authority in support of the trial court's ruling of prospectivity, the Appellant, in its oral argument and in its briefs in this Court, has sidestepped a direct challenge to the prospectivity ruling and instead has asserted the new argument that the refund statute mandates a tax return. Not only is there no support for the Appellant's new argument, it is totally inconsistent with the opinions of this Court and other courts upholding trial court decisions to apply rulings prospectively and thereby to deny refunds of money paid to states under statutes found to be unconstitutional. *E.g.*, *Lemon v. Kurtzman*, 411 U.S. 192 (1973) (court denied plaintiff's demand for a refund of monies paid under statute allowing public funds to be paid to sectarian schools); *American Trucking Associations v. Gray*, 295 Ark. 43, 746 S.W.2d 377 (Ark. 1988) (out of state truckers were not entitled to refund of taxes found violative of the commerce clause); *Division of Alcoholic Beverages and*

Tobacco v. McKesson, 524 So.2d 1000 (Fla. 1988) (court applied ruling prospectively, thereby denying refund of taxes paid under alcoholic beverage statute); *National Distributing Co. v. Office of the Comptroller*, 523 So.2d 156 (Fla. 1988) (prospective ruling appropriate where equities weighed against refund of taxes paid under alcoholic beverage statute); *Federated Mutual Ins. Co. v. DeKalb County*, 255 Ga. 522, 341 S.E.2d 3 (1986); *Metropolitan Life Ins. Co. v. Commissioner of Ins.*, 373 N.W.2d 399 (N.D. 1985) (court denied refund of taxes paid under statute giving domestic insurance companies tax preference).

The Appellant's mandatory refund argument is also inconsistent with the trial court's finding that the facts and equities of this case clearly support a prospective application of the court's ruling. As the trial court correctly found, the State of Georgia relied in good faith on the constitutionality of the pre-1985 import tax statute for some fifty years. Indeed, during the entire claim period, the State in good faith collected and spent the taxes at issue. In light of this good faith reliance, the trial court concluded that it would be unjust to impose on the State the tremendous financial burden of raising money to pay some $30,000,000 or more in tax refunds. Moreover, such a financial burden could not be justified where the Appellant most likely passed on the cost of the taxes to its customers. In short, based on its findings, the trial court properly exercised its power to give its decision prospective effect only.

CONCLUSION

For the foregoing reasons, and for those reasons stated in Appellees' initial and answer briefs in the

underlying appeals, the Appellees respectfully request that this Court reverse the trial court's ruling declaring unconstitutional O.C.G.A. § 3-4-60, as codified in 1982, 1983 and 1984, and that this Court uphold the trial court's ruling that its decision be given prospective effect only.

This 1st day of June, 1989.

Respectfully submitted,

MICHAEL J. BOWERS 071650
Attorney General

H. PERRY MICHAEL 504000
Executive Assistant Attorney General

/s/ Harrison Kohler
HARRISON KOHLER 427725
Deputy Attorney General

/s/ Verley J. Spivey
VERLEY J. SPIVEY 672700
Senior Assistant Attorney General

/s/ Amelia Waller Baker
AMELIA WALLER BAKER 734375
Senior Attorney

PLEASE ADDRESS ALL COMMUNICATIONS TO:

AMELIA WALLER BAKER
Senior Attorney
132 State Judicial Building
Atlanta, Georgia 30334
Telephone: (404) 656-2278

CERTIFICATE OF SERVICE

I do hereby certify that I have this date served a copy of the foregoing BRIEF OF APPELLEES upon:

John L. Taylor, Jr.
Michael Cole
Vincent, Chorey, Taylor & Feil
A Professional Corporation
1700 The Lenox Building
3399 Peachtree Road, N.E.
Atlanta, Georgia 30326

by placing the same into the United States mail with adequate first class postage placed thereon.

This 1st day of June, 1989.

/s/ Amelia Waller Baker
AMELIA WALLER BAKER
Senior Attorney

IN THE SUPREME COURT
FOR THE STATE OF GEORGIA

COMBINED CASE NOS. 46642 AND 46681

JAMES B. BEAM DISTILLING CO.,

Appelant/Appellee

v.

STATE OF GEORGIA, JOE FRANK HARRIS, individually and as Governor of the State of Georgia, MARCUS E. COLLINS, individually and as Georgia State Revenue Commissioner, and CLAUDE L. VICKERS, individually and as Director of the Fiscal Division of the Department of Administrative Services,

Appellees/Appellants,

SECOND SUPPLEMENTAL BRIEF OF
APPELLANT/CROSS-APPELLEE
JAMES B. BEAM DISTILLING COMPANY

COUNSEL OF RECORD:

MORTON SIEGEL
SIEGEL, MOSES & SCHOENSTADT
10 EAST HURON
CHICAGO, ILLINOIS 60611
TELEPHONE: 312/664-8998

ADDITIONAL COUNSEL:

JOHN L. TAYLOR, JR.
MICHAEL A. COLE
VINCENT, CHOREY, TAYLOR & FEIL
A PROFESSIONAL CORPORATION
THE LENOX BUILDING, SUITE 1700
3399 PEACHTREE ROAD, N.E.
ATLANTA, GEORGIA 30326
TELEPHONE: 404/841-3200

RECEIVED BY HAND DELIVERY
AND FILED:

6/30/89

Dora Anderson

SUPREME COURT OF GEORGIA

IN THE SUPREME COURT
FOR THE STATE OF GEORGIA

JAMES B. BEAM, DISTILLING CO., Appellant/Appellee v. STATE OF GEORGIA, JOE FRANK HARRIS, individually and as Governor of the State of Georgia, MARCUS E. COLLINS, individually and as Georgia State Revenue Commissioner, and CLAUDE L. VICKERS, individually and as Director of the Fiscal Division of the Department of Administrative Services, Appellees/Appellants	COMBINED CASE NOS. 46642 and 46681

SECOND SUPPLEMENTAL BRIEF
OF APPELLANT/CROSS-APPELLEE
JAMES B. BEAM DISTILLING COMPANY

I. INTRODUCTION

Appellant/Cross-Appellee James B. Beam Distilling Company files this its Second Supplemental Brief to address certain inaccuracies and misapplications of law of the Appellees/Cross-Appellants in their Supplemental Brief, as well as to point out to the Court recent authority shedding further light on the issues in this case, and

directly supporting James Beam's contentions therein. As the Court is no doubt by now well aware, this appeal arises out of the trial court's order declaring O.C.G.A. § 3-4-60 unconstitutional because of the preferential taxing treatment given by the statute to alcoholic beverages manufactured from Georgia grown products.

II. ARGUMENT AND CITATION OF AUTHORITIES

In their Supplemental Brief, Appellees continue to maintain that the Twenty-first Amendment somehow requires a special dispensation and particular lenient analysis/examination of this clearly facially discriminatory statute. At p. 2 of their Supplemental Brief, Appellees assert that "Appellant continues to argue and recite to this Court traditional commerce clause cases that do not involve the Twenty-first Amendment," as if there were a category of cases mandating that statutes employing the states, Twenty-first Amendment authority are to be handled with kid gloves. Appellees continue, "Indeed, in its supplemental brief submitted to this Court, the Appellant cites no cases involving the interplay of the Commerce Clause and the Twenty-first Amendment in support of its argument that the Appellees bear the burden of demonstrating the validity of O.C.G.A. § 30-4-60. . . . " Brief at pp. 2-3.

One need look no further than *Bacchus Imports. Ltd. v. Dias*, 468 U.S. 263 (1984), clearly the controlling authority in this case, to see that these statements are patently incorrect. "State laws that constitute mere economic protectionism are . . . not entitled to the same deference as

laws enacted to combat the perceived evils of an unrestricted traffic in liquor." *Id.* at 276. In short, facially discriminatory statutes, whether involving liquor traffic or interstate commerce in any other commodity, are subject to the strictest scrutiny. Even though this proposition can hardly be disputed, it is further supported by the recent United States Supreme Court decision in *Healy v. The Beer Institute, Inc., et al.*, 57 U.S.L.W. 4748 (U.S. June 19, 1989). In that case the Supreme Court struck down Connecticut's beer "price-affirmation statute," passed under the aegis of the Twenty-first Amendment, and defended with the argument that the Twenty-first Amendment creates a special dispensation for discriminatory laws regulating alcoholic beverages. The statute in question required out of state shippers of beer to "affirm that their posted prices for products sold to Connecticut wholesalers are, as of the moment of posting, no higher than the prices at which those products are sold in the bordering states of Massachusetts, New York, and Rhode Island." *Id.* The statute on its face violated the Commerce Clause since it applied only to brewers and shippers engaged in interstate commerce and not to those engaged solely in Connecticut sales.

Critically relevant to this Court's decision in this case is the Supreme Court's affirmation in *Healy* of the "two tiered" approach it has adopted in analyzing state economic regulation under the commerce clause. " 'When a state statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests, we have generally struck down the statute without further inquiry.' " *Id.*, citing *Brown-Forman Distillers Corp. v. New*

York State Liquor Authority, 476 U.S. 573, 579 (1986). Since *Healy* clearly and directly implicated a Twenty-first Amendment – supported statute, can there be *any* doubt that the Twenty-first Amendment gives *no* particular protection to facially discriminatory statutes? Interestingly, in support of its decision the Supreme Court cited numerous of the decisions cited in Appellant's Supplemental Brief, even though they are not Twenty-first Amendment cases – for which reason Appellees criticize the Appellant in their Supplemental Brief.

> In its previous decision, this Court has followed a consistent practice of striking down state statutes that clearly discriminate against interstate commerce, *see, e.g., New Energy Co. of Indiana v. Limbach*, ___ U.S. ___, 108 S.Ct. 1803 (1988); *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941 (1982); *Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27 (1980), *unless that discrimination is demonstrably justified by a valid factor unrelated to economic protectionism, see, e.g., Main v. Taylor*, 477 U.S. 131 (1986).

Id. at p. 4753 (emphasis supplied). If the Appellees insist on a Twenty-first Amendment – specific case placing the burden of proof on the state to justify a statute with non-protectionist purposes, then Appellant submits that, by way of the foregoing quote, the United States Supreme Court has now supplied such a case, although *Bacchus* and the remaining commerce clause cases analyzing facially discriminatory statutes already made this proposition self-evident.

The Court continued: "Appellants' reliance on the Twenty-first Amendment is foreclosed by *Brown-Forman*, where we explicitly rejected an identical argument. In

Brown-Forman, the Court specifically held that the Twenty-first Amendment does not immunize state laws from invalidation under the commerce clause when those laws have the practical effect of regulating liquor sales in other states." *Id.* This proposition finds further compelling support in Justice Scalia's separate opinion concurring in part and concurring in the judgment. Justice Scalia finds that "despite the fact that the law regulates the sale of alcoholic beverages, . . . its discriminatory character eliminates the immunity afforded by the Twenty-first Amendment. *See Bacchus Imports. Ltd. v. Dias*, 468 U.S. 263, 275-276 (1984)."

In support of their proposition that "both the cases of this Court and the Supreme Court establish that a different analysis is applicable in cases involving the Twenty-first Amendment," Brief at p. 3, Appellees cite *Joseph E. Seagram & Sons v. Hostetter*, 384 U.S. 35 (1966). Although that case has, over the years, been limited and distinguished to the point where it applied only to its particular facts, in *Healy* the case was specifically overruled.

Finally, the thinness of Appellees' argument that "the challenging party clearly bears the burden of establishing with competent evidence the invalidity of the statute" (Brief, p. 4) is revealed by the inapplicability of the cases cited in support of that proposition. The quote cited by the Appellees from *Allstate Beer. Inc. v. Julius Wile Sons & Co.*, 479 F. Supp. 605, 610 (N.D. Ga. 1979) is taken from the section of the case dealing with substantive due process, not commerce clause analysis. *Bartow Co. Bank v. Bartow Co. Board of Tax Assessors*, 251 Ga. 831, 312 S.E. 2d 102 (1984) involves a matter of statutory interpretation, and the gist of that case is that a statute will be given an

interpretation to preserve its constitutionality. This case is not one of statutory interpretation; the statute is in no way vague or ambiguous, and is facially discriminatory, so that no "interpretation" is involved. Moreover, neither the *Bartow Co. Bank* case, nor *Bohannan v. Duncan*, 185 Ga. 840, 196 S.E.2d 897 (1938) involves either the Commerce Clause or the Twenty-first Amendment. Again, the Appellees' citation of these latter two state court cases involving statutory interpretation, one from 1938, as dispositive of proof issues under Twenty-first Amendment/ Commerce Clause analysis reveals the poverty of the Appellees' analysis in defense of a clearly invalid statute which was abandoned by the State in 1985 for the very reason of its invalidity.

CONCLUSION

For the foregoing reasons, and further for those reasons stated in Appellant's initial, Answer and Supplemental Briefs in the underlying appeals, Appellant James B. Beam Distilling Company respectfully submits that the trial court's ruling declaring unconstitutional O.C.G.A. § 3-4-60, as it existed prior to 1985, must be upheld, and under the dictate of O.C.G.A. § 48-2-35, Appellant must be granted a full refund of the taxes paid during the years 1982, 1983 and 1984.

Respectfully submitted,

John L. Taylor, Jr.
Counsel for
James B. Beam Distilling Co.

OF COUNSEL:

Morton Seigel
Seigel, Moses & Schoenstadt
10 East Huron Street
Chicago, Illinois 60611

John L. Taylor, Jr.
Michael A. Cole
Vincent, Chorey, Taylor & Feil
1700 The Lenox Building
3399 Peachtree Road
Atlanta, Georgia 30326

CERTIFICATE OF SERVICE

I, Michael A. Cole, hereby certify that I have this day served a copy of the within and foregoing SECOND SUPPLEMENTAL BRIEF OF APPELLANT/CROSS-APPELLEE JAMES B. BEAM DISTILLING COMPANY by depositing a copy of same in the United States mail, postage prepaid as follows:

Jeff L. Milsteen, Esq.
Amelia Waller Baker, Esq.
The Department of Law
132 State Judicial Building
Atlanta, Georgia 30334

This 30 day of June, 1989.

/s/ Michael A. Cole
Michael A. Cole

259 Ga. 363

JAMES B. BEAM DISTILLING COMPANY

v.

STATE of Georgia et al.

STATE of Georgia

v.

JAMES B. BEAM DISTILLING COMPANY

Nos. 46642, 46681.

Supreme Court of Georgia.

July 14, 1989.

Reconsideration Denied July 26, 1989.

MARSHALL, Chief Justice.

James B. Beam Distilling Co. (Beam) brought this action seeking a $2,400,000 refund for excise taxes it paid in 1982, 1983 and 1984. The taxes were paid pursuant to OCGA § 3-4-6, which imposed a higher tax on alcoholic beverages imported into the state than on those manufactured in Georgia. The statute was amended in 1985, shortly after the United States Supreme Court found a similar statute to be unconstitutional. *See, Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 104 S.Ct. 3049, 82 L.Ed.2d 200 (1984).[1] In the proceedings below, the trial court determined that the pre-1985 statute was unconstitutional because it violated the Commerce Clause of the U.S. Constitution. The court further held that the

[1] The amended statute has been challenged and found to be constitutional. *See, Heublein, Inc. v. State*, 256 Ga. 578, 351 S.E.2d 190 (1987).

ruling would only be applied prospectively so that Beam is not entitled to a refund. We affirm.

1. The State appeals the trial court's decision that the pre-1985 version of OCGA § 3-4-60 was unconstitutional. We find no error. The statute imposed higher taxes on out-of-state products solely because of their origin. The record demonstrates that the purpose and effect of the statute was simple economic protectionism, which is virtually per se invalid under the Commerce Clause of the U.S. Constitution. *Id.*

2. Beam asserts that the trial court erred in applying the decision prospectively only. We disagree. In *Flewellen v. Atlanta Casualty Co.*, 250 Ga. 709, 300 S.E.2d 678 (1988), this Court adopted the three-pronged test set forth in *Chevron Oil v. Huson*, 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971), to be applied in deciding a retroactivity question:

> (1) Consider whether the decision to be applied nonretroactively established a new principle of law, either by overruling past precedent on which litigants relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed.
>
> (2) Balance of the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation would further or retard its operation.
>
> (3) Weigh the inequity imposed by retroactive application, for, if a decision could produce substantial inequitable results if applied retroactively, there is ample basis for avoiding the injustice or hardship by a holding of nonretroactivity.

Flewellen, 250 Ga. at 712, 300 S.E.2d 673. Retroactive application of a judicial decision is not compelled constitutionally or otherwise[2] where unjust results would accrue to those who justifiably relied on the prior rule. *Strickland v. Newton County*, 244 Ga. 54, 258 S.E.2d 132 (1979) (decision holding local option sales tax should be applied prospectively to avoid unjust results).

Applying the first prong of the *Chevron* test, we note that the decision does not now establish a "new rule." However, if the decision had been rendered during 1984, the last year that the tax was assessed, it would certainly have overruled past precedent. The tax structure embodied in OCGA § 8-4-60 had been in effect in Georgia since 1938. In 1939 the statute was challenged on the grounds that it violated the Commerce Clause of the U.S. Constitution and was upheld. *Scott v. State*, 187 Ga. 702, 2 S.E.2d 65 (1939), overruled on other grounds, *Blackston v. Georgia Department of Natural Resources*, 255 Ga. 15, 334 S.E.2d 679 (1985). After the *Scott* decision, the import tax was not challenged again until 1985. *See Heublein*, supra. During the time that the taxes at issue here were collected, the State had no reason to believe that the import taxes were unconstitutional. Moreover, when it became clear that

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[2] We are not persuaded by Beam's argument that OCGA § 48-2-35(a) mandates retroactive application of the constitutional decision. The statute provides, "A taxpayer shall be refunded any and all taxes or fees which are determined to have been erroneously or illegally assessed and collected from him . . . " The statute does not describe how it should be determined that a tax was "illegally assessed." It simply does not address the issue of retroactive versus prospective application of a constitutional decision.

there might be constitutional problems with the statute, *see Bacchus*, supra, the legislature moved promptly to amend the statute to rectify the defects. Thus, it appears that the first prong of the *Chevron* test favors prospective application of the rule.

The second prong of the *Chevron* test has no application here because the statute at issue was repealed in 1985. We move therefore to the third prong of the test, which involves balancing the equities, Beam seeks 2.4 million dollars that it paid in 1982, 1983 and 1984. There are at least two other lawsuits currently pending in which other alcohol producers seek over 28 million dollars in tax refunds on the same grounds. Economic realities lead to the inescapable conclusion that the cost of this tax has or could have been already absorbed by the companies and passed on to Georgia consumers. Indeed, retroactive application of the ruling might well result in a windfall to the alcohol producers.

On the other hand, if the decision is applied retroactively, Georgia faces liability for over 30 million dollars in refunds for taxes it collected in good faith under an unchallenged and presumptively valid statute. Georgia would have to refund large sums of money that it has already spent. Prospective application would avoid imposing a severe financial burden on the State and its citizens. In such situations, this Court and the courts of other states have frequently declined retroactive application, even though the ruling allows an unconstitutional statute to remain in effect for a limited period of time. *See, Federated Mutual Ins. Co. v. DeKalb County*, 255 Ga. 522, 341 S.E.2d 3 (1986); *American Trucking Association v. Gray*, 295 Ark. 43, 746 S.W.2d 377 (1988) (out-of-state

truckers were not entitled to refund of taxes found violative of the Commerce Clause); *National Distributing Co. v. Office of the Comptroller*, 523 So.2d 156 (Fla.1988) (prospective ruling appropriate where equities weighed against refund of axes paid under alcoholic beverage statute); *Metropolitan Life Ins. Co. v. Commissioner of Dept. of Insurance*, 373 N.W.2d 399 (N.D.1985) (no refund of taxes paid under statute giving unconstitutional preference to domestic insurance companies).

3. In 1939, this court upheld the precursor to the pre-1985 version of OCGA § 3-4-60 against a Commerce Clause challenge. *Scott v. State*, 187 Ga. 702, 2 S.E.2d 65 (1939), *overruled on other grounds, Blackston v. Georgia Dep't of Natural Resources*, 255 Ga. 15, 334 S.E.2d 679 (1985). Now, some fifty years later, we are striking down its successor because it violates the Commerce Clause.

As the dissent points out, there are a number of cases strongly supporting the argument that because the statute was unconstitutional, it was void ab initio. *See, e.g., Dennison Mfg. Co. v. Wright*, 156 Ga. 789, 120 S.E. 120 (1923); *Battle v. Shivers*, 39 Ga. 405 (1869).

However, the rule of voidness ab initio is not an absolute rule. It has exceptions.

> "The general rule is that an unconstitutional statute is wholly void and of no force and effect from the date it was enacted. This harsh rule is subject to exceptions, however, where, because of the nature of the statute and its previous application, unjust results would accrue to those who justifiably relied on it. . . . " While we have declared statutes to be void from their inception when they were contrary to the Constitution at the time of enactment, . . . those decisions are not applicable to the present controversy, as the original . . . statute, when adopted, was not violative of the Constitution under court interpretations of that period.

Adams v. Adams, 249 Ga. 477, 478-79, 291 S.E.2d 518 (1982) (citations omitted) (quoting *Strickland v. Newton County*, 244 Ga. 54, 55, 258 S.E.2d 132 (1979) (citations omitted)). Other cases have held similarly. *E.g., Strickland v. Newton County*, 244 Ga. 54, 55, 258 S.E.2d 132 (1979); *Allan v. Allan*, 236 Ga. 199, 207-08, 223 S.E.2d 445 (1976). In all of these cases, the court has applied its decision prospectively rather than retroactively.

We apply the exception to the general rule. Here, the state has collected taxes under this statute or its predecessors over a half century in reliance on a decision of this court. Under these circumstances and the balancing factors discussed in division two, *supra*, we hold it would be unjust to declare the statute void ab initio.

In sum, we conclude that prospective application of the decision is appropriate. The decision of the trial court is affirmed in all respects.

Judgment affirmed. All the Justices concur, except SMITH and WELTNER, JJ., who dissent as to Divisions 2 and 3.

46642, 46681. JAMES B. BEAM DISTILLING COMPANY V. STATE OF GEORGIA et al. and vice versa.

SMITH, Justice, concurring in part and dissenting in part.

The problem with this case is that it is too simple. All that is involved is a statute which has been declared

unconstitutional, a constitutional provision which requires this Court to declare the unconstitutional statute *void*, and a statute which says taxes erroneously or illegally collected must be refunded. This case involves the state's illegal collection of taxes from a single, readily-identifiable party on the basis of an unconstitutional statute. The majority has successfully avoided the clear mandate of the Georgia Constitution, Georgia case law, and the Georgia refund statute. The "complicated exceptions" which the majority pointed out only make the simplicity of this case more pronounced. In short, the majority opinion is an excellent example of the judiciary attacking the solid rock of established Georgia constitutional law and Georgia case law with a hoe and trying to convince everyone that it's a bulldozer.

TAXPAYER'S RIGHTS

By placing emphasis on the issue of whether the decision in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 104 S.Ct. 3049, 82 L.Ed.2d 200 (1984)[1] should be given a retroactive application, the majority disguises the real issue: Which is more important in Georgia – the state's

[1] The Court in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 277, 104 S.Ct. 3049, 3058, 82 L.Ed.2d 200 (1984), declined to address the refund issue. It remanded the case to the Supreme Court of Hawaii to determine the refund issues "which are essentially issues of remedy for the imposition of a tax that unconstitutionally discriminated against interstate commerce . . . " 468 U.S. at 277, 104 S.Ct. at 3058. The Court did note, "It may be, for example, that given an unconstitutional discrimination, a full refund is mandated by state law." Note 14. Here the statute unconstitutionally discriminated against non-resident taxpayers and a full refund is mandated by state law.

right to protect the ill-gotten gains of the treasury or the taxpayer's right to relief after a clear violation of the taxpayer's constitutional rights? See Tatarowicz, *Right to a Refund for Unconstitutionally Discriminatory State Taxes and Other Controversial State Tax Issues Under the Commerce Clause*, 41 Tax Lawyer (Fall 1987).

The majority opinion concludes that the state's right to protect its treasury is more important; however, I believe that the right of the taxpayer is more important.[2] The majority found, and I agree, that "the purpose and effect of the statute was simple economic protectionism, which is virtually per se invalid under the Commerce Clause of the U.S. Constitution."

Thus, I concur in the part of the majority opinion that affirms the trial court's holding that the pre-amendment statute was unconstitutional; however, there are several separate and distinct statutory and constitutional issues involved in this case that clearly distinguish it from the cases that have been cited by the majority.[3] Therefore, I

[2] As we celebrate this Fourth of July, we are reminded that one of the sparks which ignited the Revolutionary War was the abusive manner in which the colonists were being taxed by the King. Our forefathers fought and won independence from a King who extracted excessive taxes, and the Constitution was drafted to protect the people from such abuses.

[3] Only one Georgia case was cited by the majority in division two which allegedly supports its conclusion that "an unconstitutional statute [may] remain in effect for a limited period of time." This case, *Federated Mutual Ins. Co. v. DeKalb County*, 255 Ga. 522, 341 S.E.2d 3 (1986), dealt with a repeal of a statute or ordinance by implication. The constitutionality of the

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strongly disagree with the majority's conclusion "that prospective application of the decision is appropriate."

DISCUSSION OF THE MAJORITY OPINION

1. This Court adopted the test for retroactive application of judicial decisions set forth in *Chevron Oil v. Huson*, 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971) in *Flewellen v. Atlanta Casualty Co.*, 250 Ga. 709, 300 S.E.2d 673 (1983), but *Flewellen* did not declare a statute unconstitutional.[4]

The majority also states in division two: "Retroactive application of a judicial decision is not compelled constitutionally or otherwise where unjust results would accrue to those who justifiably relied on the prior rule." As set out in Div. 3, infra, of this dissent, there is no question of "retroactive application of a judicial decision" when a statute is declared unconstitutional in Georgia. Once a statute is declared unconstitutional it becomes the *constitutional duty* of the judiciary to declare the statute *void*.

2. The majority would have us believe an earlier unsuccessful constitutional challenge in *Scott v. State*, 187

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statute was not involved. The other cases cited were foreign, and the majority did not show that those states have constitutional provisions similar to Georgia's. Under our constitution a statute is either constitutional and valid or unconstitutional and *void*. The constitution does not mandate a holding of "partial voidness."

[4] The only issue in *Flewellen* involved the proper interpretation and application of state insurance statutes.

Ga. 702, 2 S.E.2d 65 (1939), somehow negates the constitutional mandate requiring this Court to declare the unconstitutional statute *void*. There is nothing in the Georgia Constitution indicating that reliance upon earlier decisions of this Court in any way changes or modifies the mandate of the constitution to declare unconstitutional statutes *void*.

THE GEORGIA CONSTITUTIONAL MANDATE

3. Our constitution *requires* us to declare unconstitutional legislative acts *void*. Ga. Constitution 1983, Art. I, Sec. II, Par. V.[5] That constitutional provision does not allow this Court to set a specific date upon which an unconstitutional statute becomes inoperative. It does not allow this Court to determine that a statute is just a little bit void. It does not allow this Court to ignore its clear mandate or the long line of Georgia cases that have upheld the constitutional mandate. Nor can this Court rely on United States Supreme Court decisions that are not on point and in which the Georgia Constitution was never discussed or considered. (See Div. 5, infra, discussion of *Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371, 60 S.Ct. 317, 84 L.Ed. 329 (1940).) Instead our constitution and case law require us to declare unconstitutional acts entirely *void* from their inception.

> An unconstitutional statute, though having the form, features, and name of law, is in reality no

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[5] Paragraph V of the 1983 Georgia Constitution entitled "What acts void" states: "Legislative acts in violation of this Constitution or the Constitution of the United States are void, and the judiciary shall so declare them."

law. It is wholly void. In legal contemplation it is as inoperative as if it had never been passed. It has been declared that it is a misnomer to call such statute a law. Such a statute confers no authority upon any one, and affords protection to no one. *Norton v. Shelby County,* 118 U.S. 425 (6 Sup.Ct. 1121, 30 L.ed. 178); *Ex Parte Siebold,* 100 U.S. 371, 376 (25 L. ed. 717); [Cits.]; *McCants v. Layfield,* 149 *Ga.* [231] 238, (99 S. E. 877).

In *Osborn v. Bank of the United States,* 9 Wheat. 738 (6 L. ed. 204), Chief Justice Marshall declared that "it is an extravagant proposition that a void act can afford protection to the person who executes it." In *Boston v. Cummins,* 16 *Ga.* 102, 106 (60 Am. D. 717), this court declared that "The unconstitutional acts of the legislature, State and Federal, *are not laws;* and *no court will execute them, having a proper sense of its own obligations and responsibilities.*" In *Wellborn v. Estes,* 70 *Ga.* 390 this court said: "Legislative acts in violation of the constitution of this State or of the United States are void." The constitution of this State declares that "Legislative acts in violation of this constitution or the constitution of the United States are void, and the judiciary shall so declare them." Proceedings under an unconstitutional statute had before such statute is judicially declared to be unconstitutional are void. *Jordan v. Franklin,* 131 *Ga.* 487 (52 [62] S. E. 673); *Worth County v. Crisp County,* 139 *Ga.* 117 (3) (76 S.E. 747); *James v. Blakely,* 143 Ga. 117 (84 S. E. 431). (Emphasis supplied in part.)

Dennison Mfg. Co. v. Wright, 156 Ga. 789, 797, 120 S.E. 120 (1923). See also *State Highway Department v. H.G. Hastings Co.,* 187 Ga. 204, 215, 199 S.E.2d 793 (1938); *Tarpley v. Carr,* 204 Ga. 721, 727, 51 S.E.2d 638 (1949) (City officers were not *de facto* officers of office created under an unconstitutional charter); *Franklin v. Harper,* 205 Ga. 779, 784, 55

S.E.2d 221 (1949); *Baggett v. Linder,* 208 Ga. 590, 591, 68 S.E.2d 469 (1952); *Milam v. Adams,* 216 Ga. 440, 444, 117 S.E.2d 343 (1960); *K. Gordon Murray Productions, Inc. v. Floyd,* 217 Ga. 784, 787, 125 S.E.2d 207 (1962) (" . . . the remedy provided in the ordinance is not even law if the petitioner's constitutional attack is sustained.") *Dobson v. Brown,* 225 Ga. 73, 76, 166 S.E.2d 22 (1969) (" 'Not even estoppel can legalize or vitalize that which the law declares unlawful and void.' "); and *Mapp v. First Georgia Bank, et al.,* 156 Ga.App. 380, 274 S.E.2d 765 (1980). (See note 7, infra.)[6]

Although *Bacchus* may have led this Court to conclude that the Georgia statute, in the present case was unconstitutional, it does not affect Art. I, Sec. II, Par. V of the Georgia Constitution which provides that an unconstitutional statute is void from its inception. Once the statute was declared unconstitutional, it was as if no statute, case law, or public policy had ever been established. "The Constitution is irrepealable, and any law in violation of it is void – is null; rights *cannot* grow up under such a law." *Battle v. Shivers,* 39 Ga. 405, 417 (1869). Once the statute was declared unconstitutional it became inoperative, as if it had never been passed. Therefore, no court having a proper sense of its own obligations and responsibilities will execute it. *Dennison,* supra, 156 Ga. at 797, 120 S.E. at 120. The state had no authority to assess or collect the taxes, and this Court has no authority to execute a void statute.

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[6] The law in this area has been so firmly established that few recent cases discuss the issue.

THERE ARE NO EQUITIES TO BALANCE

4. The majority's discussion of "balancing the equities," is misplaced. When a statute is declared unconstitutional, there can be no balancing of equities as none exist. "[W]e are bound to follow the laws of this state and the decisions of our Supreme Court even when . . . the resulting decision effects a hardship. . . . " *Mapp v. First Georgia Bank, et al.*, 156 Ga.App. 380, 381, 274 S.E.2d 765 (1980).[7]

COURT CREATED "EXCEPTIONS" TO THE GEORGIA CONSTITUTION

5. A careful reading of the three cases cited by the majority for the "exceptions" to the constitutional mandate reveals a fundamental weakness. The first case to deviate from the constitutional mandate and the feeble

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[7] On May 26, 1976 appellant Mapp purchased an automobile from Ed Cook. The car had been purchased by Cook from Hopkins Chevrolet, Inc., which in turn had purchased the automobile from Timmer Chevrolet, Inc., pursuant to a sale under the Georgia Abandoned Motor Vehicle Act. On October 26, 1976, First Georgia Bank repossessed the automobile, claiming that it held a perfected security interest in the automobile which had been created at the time of the initial purchase by C.J. Wilson. Mapp filed suit against the Bank, alleging that the Bank had illegally converted the automobile. The trial court granted summary judgment in favor of the Bank, concluding that Mapp's title was invalid on the basis of a 1979 case which held the Georgia Abandoned Motor Vehicle Act to be unconstitutional. Since the sale was in accordance with an act which was later held to be unconstitutional, the sale passed no title. The Court of Appeals affirmed the trial court's ruling because an unconstitutional statue is a void statute from its inception and no rights accrue thereunder.

foundation relied upon in the other two cited cases is *Allan v. Allan*, 236 Ga. 199, 223 S.E.2d 445 (1976). The Court in *Allan*, without any discussion of the Georgia Constitution or the long line of Georgia cases that have declared that an unconstitutional statute is *void*, relied instead upon dicta set forth by the United States Supreme Court in *Chicot County Drainage District v. Baxter State Bank*, 308 U.S. 371, 374, 60 S.Ct. 317, 318, 84 L.Ed. 329 (1939). However, immediately preceding the *Chicot* dicta that the majority relied upon, the following appeared:

> [An] Act of Congress, having been found to be unconstitutional, [is] not a law; that it [is] inoperative, conferring no rights and imposing no duties. . . . *Norton v. Shelby County* 118 U. S. 425, 442 [6 S.Ct. 1121, 1125, 30 L.Ed. 178]; *Chicago, I. & L. Ry. Co. v. Hackett*, 228 U. S. 559, 566 [33 S.Ct. 581, 584, 57 L.Ed. 966].

Chicot at 374, 60 S.Ct. at 318.

An even more astonishing discovery in reading *Chicot* is that *Chicot* cited *Norton v. Shelby County*, the exact same case cited in *Dennison*, supra, (see Div. 3 of this dissent), for the proposition that an unconstitutional statute "confers no authority upon any one, and affords protection to no one." See division 3 of this dissent. The *Allan* opinion ignored the above language with its two citations to Supreme Court decisions and quoted dicta that was completely devoid of a citation to any decision of any court.[8]

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[8] The language relied upon by *Allan* was totally unnecessary in adjudicating the *Chicot* case. The respondents in *Chicot*

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Reliance on unsupported *Chicot* dicta in *Allan* or in any other case is totally without foundation and substance. The cases that follow *Chicot* and *Allan* represent abberations that should be overruled because they conflict with the Georgia Constitution and Georgia cases. See also *Strickland et al. v. Newton County, et al*, 244 Ga. 54, 258 S.E.2d 132 (1979) and *Adams v. Adams*, 249 Ga. 477, 479, 291 S.E.2d 518 (1982) which use *Allan* and *Chicot* as their authority.

THE EXTRAORINDARY FACTS OF THE THREE CASES

6. Assuming *arguendo* that the cases are not abberations but do in fact represent "exceptions," then they offer the strongest arguments for declaring this case is not such an "exception." Each of the "exception cases" contained unusual and extraordinary conditions that are not present in this case. By applying the alleged "exceptions" to the general rule, the majority has made the "exceptions" the rule.

In the three cases that represent the "exceptions," the Court in attempting to do equity, did not face the constitutional mandate head-on.

In *Allan*, *Strickland*, and *Adams*, there may have been other individuals who may have been harmed in the past, but they were, for all practical purposes, unascertainable.

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failed to raise a constitutional issue in the courts below; therefore, the case was "appropriately confine[d] . . . to the question of *res judicata*. . . . " 308 U.S. at 375, 60 S.Ct. at 319.

The amount of damage suffered by other individuals was also almost impossible to determine. In *Allan* and *Adams* there was also the potential of disrupting years of quiet titles and confusing property law.

This case, on the other hand, involves one clearly-identified taxpayer who paid the state an ascertainable amount of money in illegal taxes over a specified period of time; therefore, there is no difficulty in determining to whom the taxes should be refunded and for what amount. In addition, such a refund would not disturb property law.

The "exceptions" are built upon a faulty unconstitutional foundation, and they should fall. They are court-made, but not constitutionally allowed.

THE CONSTITUTION IS THE WILL OF THE PEOPLE

7. The supreme power of this state is in the people and the written constitution is the will of the people. The people have decided that the judiciary must declare unconstitutional statutes *void*. By looking to dicta of United States Supreme Court decisions – in which our constitution was not at issue – this Court ignores the dictate of the people as set forth in the Georgia Constitution.

THE REMEDY STATUTE REPRESENTS THE PUBLIC POLICY OF THE STATE

8. By employing sweeping language in the remedy statute, OCGA § 48-2-35, the General Assembly made clear that *any and all* taxes which are erroneously or

illegally assessed and collected shall be refunded.[9] If the court denies a refund to a taxpayer who has successfully challenged the constitutionality of a taxing statute, then the Court has assumed that the remedy statute has no meaning. This is contrary to established law. "The courts of this state will not assume that the Legislature intended any provision of a statute to be without meaning." *Douglas County v. Anneewakee, Inc.*, 179 Ga.App. 270, 273, 346 S.E.2d 368 (1986).

The remedy statute represents the state's public policy to refund any and all taxes erroneously or illegally assessed and collected under state law. The statute includes taxes which are paid voluntarily and involuntarily, thus no element of duress is required nor must a protest be filed. The remedy statute is mandatory rather than directory, and it acts as a waiver of sovereign immunity. *Thompson v. Continental Gin Co.*, 73 Ga.App. 694, 37 S.E.2d 819 (1946).

Since the General Assembly intended to allow refunds under many different circumstances, it is incomprehensible that the taxpayer in the present case who successfully challenged the constitutionality of the taxing statute is barred from recovery. The key words of the

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[9] OCGA § 48-2-35 is entitled "Refunds." Subsection (a) provides: "A taxpayer *shall be refunded* any and all taxes or fees which are determined to have been erroneously or illegally assessed and collected from him under the laws of this state, whether paid voluntarily or involuntarily, and shall be refunded interest on the amount of the taxes or fees at the rate of 9 percent per annum from the date of payment of the tax or fee to the commissioner. . . . " (Emphasis supplied.)

remedy statute are *erroneously or illegally assessed and collected*. The majority indicates that the state had "no reason to believe that the import taxes were unconstitutional"; however, under the broad language of the statute it makes no difference that the state *erroneously* assessed and collected taxes under the unconstitutional statute. Erroneously assessed and collected taxes must be returned. Once the taxing statute was declared unconstitutional and *void*, there was no legal collection of these taxes, nor had there ever been one. Therefore, the state is illegally in possession of the taxpayer's property.

OTHER CONSTITUTIONAL PROVISIONS WHICH REQUIRE REPAYMENT

9. There are also constitutional provisions which require the return of unconstitutionally assessed and collected taxes. The state cannot deprive a person of property without due process of law. Georgia Constitution 1983, Art. I, Sec. I, Par. I. The due-process clause extends to every proceeding which may be a deprivation of "life, liberty, or property, whether the process be judicial or administrative or executive in its nature. [Cit.]" *Zachos v. Huiet*, 195 Ga. 780, 786, 25 S.E.2d 806 (1943). The assessment and collection of taxes in the absence of a valid taxing statute constitutes such an unconstitutional deprivation of property.

10. One of the paramount duties of government is to protect the property of its taxpayers. Georgia Constitution 1983, Art. I, Sec. I, Par. II. "It is the duty of the State government, through the instrumentality of the courts, to protect the property of a citizen and his right to possess and control it." *Irwin v. Willis*, 202 Ga. 463, 477, 43 S.E.2d

691 (1947). This Court must protect taxpayers who have had property erroneously or illegally taken under the auspices of an unconstitutional taxing statute by requiring the state to refund such illegally-collected taxes.[10]

The above constitutional provisions, all found in our Bill of Rights, were enacted to place limits on the government and to protect the people from governmental abuses. The government's authority to tax is powerful. In fact, in 1819 Chief Justice Marshall said:

> [That] the power to tax involves the power to destroy. . . . [is a] proposition[ ] not to be denied.

McCulloch v. Maryland, 17 U.S. (4 Wheaton) 316, 431, 4 L.Ed. 579 (1819).

If this Court does not treat the unconstitutional statute as *void* from its inception, then nothing will deter the state from enacting other unconstitutional statutes and reaping the benefits therefrom. The constitutional mandate to declare the statute void, Ga. Constitution, 1983, Art. I, Sec. II, Par. V, is the taxpayer's protection from the power of the sovereign "to destroy." *McCulloch*, id.

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[10] An identical question is involved in *Marcus Collins v. Waldron and all Retired Federal Employees Similarly situated*, No. 47018 argued June 27, 1989. Retired federal employees challenged Georgia's scheme of taxation which taxes the retirement income of federal retirees while exempting the retirement income of state retirees as being unconstitutional. They argued, under the authority of *Davis v. Michigan Department of Treasury*, ___ U.S. ___, 109 S.Ct. 1500, 103 L.Ed.2d 891 (1989), that the Georgia scheme is unconstitutional and, therefore, the taxes were illegally collected.

This Court has placed a great deal of emphasis on the fact that the taxpayer in this case is a liquor company. It does not matter who the taxpayer is – a liquor company or an illegally taxed individual – the taxpayer is entitled to protection under the laws of this state. As former Supreme Court Justice Hugo Black said:

> Good men and bad men are entitled to trial and sentence in accordance with the law.

CONCLUSION

The constitutional mandate requiring this Court to declare the statute *void* has been ignored. The state's expressed public policy to refund taxes is thwarted just as the remedy statute, OCGA § 48-2-35, is trampled and, in reality, repealed by this Court. The majority's insistence upon declaring the statute *void* prospectively only,[11] while ignoring the Georgia Constitution, grants a hollow victory to the appellant who proved the taxing statute was unconstitutional. It also denies a remedy for the unlawful taking of the appellant's property, disregards the mandatory nature of the remedy statute, and sends the message to Georgia taxpayers that this Court will not protect their rights nor require the state to be accountable for taxes unconstitutionally and erroneously or illegally assessed and collected.

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[11] How can something be applied prospectively if it never existed? The doctrine of nonretroactivity may be used when dealing with a valid statute, law, case law, or a change in law or public policy. It does not apply and is not used in Georgia constitutional cases because the statute, case law, or public policy must, as required by our constitution and case law, be treated as if it never existed.